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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONER,

vs.

FEDERAL MARITIME COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1967
CERTIORARI GRANTED JUNE 12, 1967

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Docket Before the Commission

(Docket 1)

DOCKET No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT,

against

MARINE TERMINALS CORPORATION and MARINE TERMINALS CORPORATION (OF LOS ANGELES).

Exhibit No.	*Description*
1.	Complaint, dated January 17, 1963, 10 pages, with 1-page Power of Attorney, and 8-page Exhibit A, 4-page Exhibit B, 4-page Exhibit C, 11-page Exhibit D, 4-page Exhibit E, 8-page Exhibit F, 11-page Exhibit G, 8-page Exhibit H, 4-page Exhibit I, 1-page Exhibit J, and 1-page Exhibit K.
2.	Answer to Complaint, dated February 15, 1963, 5 pages.
3.	Notice of Assignment, dated February 18, 1963, 1 page.
4.	Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint, dated February 18, 1963, 9 pages, with 2-page Exhibit A and 4-page Exhibit B.
5.	Permission to Intervene, dated February 27, 1963, 1 page.
6.	Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint, dated March 7, 1963, 11 pages.

Docket Before the Commission

Exhibit No.	*Description*
7.	Notice of Hearing, dated March 25, 1963, 1 page.
8.	Location of Hearing Room, dated March 29, 1963, 1 page.
9.	Application for Subpoena *Duces Tecum*, dated April 4, 1963, 5 pages.
10.	Ruling on Application for Subpoena Duces Tecum, dated April 12, 1963, 1 page.
11.	Late Filed Exhibit, dated May 29, 1963, 1 page.
12.	Complainant's Brief and Proposed Findings of Fact and Conclusions of Law, dated June 21, 1963, 45 pages, with 14-page Appendix.
13.	Permission for Pacific Maritime Association to Exceed the Limitation on Length of Briefs, dated July 16, 1963, 1 page.
[2] 14.	Brief of Intervener, Pacific Maritime Association, dated July 23, 1963, 70 pages; with 8-page Appendix.
15.	Respondents' Answering Brief, dated July 19, 1963, 11 pages.
16.	Complainant's Reply Brief, dated August 12, 1963, 29 pages.
17.	Initial Decision, dated June 4, 1964, 38 pages, with 17-page attachment.
18.	Request of Complainant for Enlargement of Time within which to File Exceptions to Initial Decision, dated June 12, 1964, 8 pages.
19.	Pacific Maritime Association's Reply to Request of Complainant for Extension of Time, dated June 16, 1964, 3 pages.

Docket Before the Commission

Exhibit No.	*Description*
20.	Enlargement of Time for Filing Exceptions and Replies, dated June 18, 1964, 1 page.
21.	Request of Complainant for Permission to File a Brief in Support of its Memorandum of Exceptions in Excess of Fifty Pages, dated July 30, 1964, 6 pages.
22.	Complainant's Memorandum of Exceptions and Brief, dated July 30, 1964, 75 pages, with 6-page appendix.
23.	Exceptions and Brief in Support of Exceptions of Respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), dated July 24, 1964, 12 pages.
24.	Enlargement of Time for Filing Replies to Exceptions, dated August 4, 1964, 1 page.
25.	Reply of Respondent to Complainant's Exceptions, dated August 28, 1964, 3 pages.
26.	Intervener's Answering Brief in Support of Initial Decision of Examiner, dated August 31, 1964, 43 pages, with 27-page Appendix A.
27.	Notice of Oral Argument, dated October 14, 1964, 1 page.
28.	Allotment of Time at Oral Argument, dated October 28, 1964, 1 page.
29.	Transcript of Oral Argument, November 4, 1964, pages 1 through 92.
30.	Report of the Commission, dated October 13, 1965, 65 pages, with 1-page Order.
31.	Transcript of Hearing, April 22-26, 1963, 440 pages, Volumes I-V.

Docket Before the Commission

Exhibit No.	*Description*
[3] 32.	The following Exhibits were received:
1a	Memorandum of Understanding between Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, dated August 10, 1959, 13 pages.
1b	Memorandum of Agreement on Mechanization and Modernization, October 18, 1960, 9 pages, with 2-page Exhibit A.
1c	ILWU-PMA Supplemental Agreement on Mechanization and Modernization, November 15, 1961, 45 pages.
1d	Schedule A Death and Disability Benefits, 7 pages.
1e	Schedule B Vesting Benefits, 6 pages.
1f	Schedule C Supplemental Wage Benefits, 19 pages.
1g	Letter from Pacific Maritime Association to International Longshoremen's & Warehousemen's Union, dated November 15, 1961, 2 pages.
1h	Letter from Pacific Maritime Association to International Longshoremen's & Warehousemen's Union, dated November 15, 1961, 2 pages.
1i	Letter from Pacific Maritime Association to International Longshoremen's & Warehousemen's Union, dated November 15, 1961, 3 pages.
1j	First Amendment to ILWU-PMA Supplemental Agreement on Mechanization and Modernization, dated October 29, 1962, 2 pages.

Docket Before the Commission

Exhibit No.	*Description*
2a	Minutes of Annual Meeting of Members of Pacific Maritime Association, March 14, 1963, 4 pages.
2b	Minutes of Regular Quarterly Meeting of Board of Directors of Pacific Maritime Association, March 14, 1963, 9 pages.
2c	Minutes of Meeting of Board of Directors of Pacific Maritime Association, February 4, 1963, 4 pages.
2d	Minutes of Regular Quarterly Meeting of Board of Directors of Pacific Maritime Association, December 12, 1962, 9 pages.
2e	Minutes of Meeting of Members of Pacific Maritime Association, July 26, 1962, 3 pages.
[4] 2f	Minutes of Meeting of Board of Directors and American Flag Operators of Pacific Maritime Association, July 3, 1962, 10 pages.
2g	Minutes of Meeting of Members of Pacific Maritime Association, May 14, 1962, 5 pages.
2h	Minutes of Regular Meeting of Board of Directors of Pacific Maritime Association, December 13, 1961, 5 pages.
2i	Minutes of Meeting of Board of Directors of Pacific Maritime Association, November 7, 1961, 7 pages.
2j	Minutes of Meeting of Board of Directors of Pacific Maritime Association, August 10, 1961, 6 pages.
2k	Minutes of Meeting of Board of Directors of Pacific Maritime Association, July 11, 1961, 8 pages.

Docket Before the Commission

Exhibit No.	*Description*
2l	Minutes of Annual Meeting of Members of Pacific Maritime Association, March 13, 1961, 4 pages.
2m	Minutes of Regular Quarterly Meeting of Board of Directors of Pacific Maritime Association, March 8, 1961, 20 pages.
2n	Minutes of Meeting of Board of Directors of Pacific Maritime Association, January 16, 1961, 4 pages.
2o	Minutes of Meeting of Members of Pacific Maritime Association, January 10, 1961, 4 pages.
2p	Minutes of Meeting of Board of Directors of Pacific Maritime Association, January 6, 1961, 3 pages.
3	By-laws as amended of Pacific Maritime Association, April 1960, 46 pages.
4	Pacific Coast Longshore Agreement, 1961-1966, 139 pages.
5	Letter from American President Lines to J. Paul St. Sure, dated January 4, 1961, 1 page.
5a	Report of PMA Committee on Work Improvement Fund Contributions Procedures, dated January 4, 1961, 9 pages.
[5] 5b	Statement of Minority Opinion on ILWU Funding, dated January 4, 1961, 6 pages.
6	Letter from Pacific Maritime Association to members dated January 11, 1961, 2 pages.

Docket Before the Commission

Exhibit No.	*Description*
7	Letter from Winchester Agencies, Inc. to Pacific Maritime Association, dated January 17, 1961, 3 pages.
8	Telegram to Pacific Maritime Association from San Francisco Port Authority, 1 page.
9	Letter from Marine Terminals Corporation to Pacific Maritime Association, dated March 1, 1961, 1 page.
10	Letter to Pacific Maritime Association from Peter N. Teige, dated March 3, 1961, 4 pages.
11	Letter to K. F. Saysette from J. D. MacEvoy, dated March 24, 1961, 1 page.
12	Letter from Waterman Corporation of California to Associated Banning, dated March 23, 1961, 2 pages.
13	Letter from Marine Terminals Corporation to Pacific Maritime Association, dated May 1, 1961, 1 page.
14	Letter from Marine Terminals Corporation to Pacific Maritime Association, dated May 1, 1961, 1 page.
15	Letter from Pacific Far East Line, Inc. to Pacific Maritime Association, dated May 22, 1961, 1 page.
16	Letter from Seattle Stevedore Co. to Pacific Maritime Association, dated May 25, 1961, 2 pages.
17	Letter from Marine Terminals Corporation to Pacific Maritime Association, dated May 25, 1961, 2 pages.

Docket Before the Commission

Exhibit No.	*Description*
18	Letter from Brady-Hamilton Stevedore Co. to Pacific Maritime Association, dated May 25, 1961, 2 pages.
19	Letter from K. F. Saysette to H. J. Bodine, dated August 3, 1961, 2 pages.
[6] 20	Minutes of Committee on Work Improvement Fund Contribution Procedures, August 1, 1961, 5 pages.
21	Memorandum on the Mechanization Fund, August 15, 1961, 2 pages.
22	Memo to J. Paul St. Sure from P. Lancaster, dated October 24, 1961, 2 pages.
23	Telegram to Pacific Maritime Association from Seattle Stevedore Co., 1 page.
24	Telegram to Pacific Maritime Association from Brady Hamilton Stevedoring Co., 1 page.
25	Letter from Marine Terminals Corporation to Peter N. Teige, dated November 29, 1961, 1 page.
26	Letter from Winchester Agencies, Inc., to Peter N. Teige, dated November 29, 1961, 3 pages.
27	Memo to J. Paul St. Sure from Pres. Lancaster dated December 13, 1961, 2 pages.
28	Memo on Proposed Five to One Maximum Limitation on Assessable Tonnage for Automobiles, dated February 8, 1962, 1 page.
29	Memorandum for J. Paul St. Sure dated February 20, 1962, 1 page.

Docket Before the Commission

Exhibit No.	*Description*
30	Letter from Graham James & Rolph to Pacific Maritime Association, dated March 23, 1962, 1 page.
31	Memorandum to J. Paul St. Sure from Pres. Lancaster, dated March 27, 1962, 1 page.
32	Letter from McCutchen, Doyle, Brown & Enersen to Marine Terminals Corporation, dated December 10, 1962, 2 pages.
33	Letter from Waterman Corporation of California to California Stevedore & Ballast Co., dated January 25, 1963, 2 pages.
34	Letter from Pacific Maritime Association to members, dated January 17, 1961, 2 pages.
35	Letter from Pacific Maritime Association to members, dated January 17, 1961, 2 pages.
[7] 36	Letter from Pacific Maritime Association to members, dated February 3, 1961, 1 page.
37	Telegrams to Pacific Maritime Association from Albina Dock Co., the Commission of Public Docks, Portland, Oregon, the Port of Olympia, Washington, the Port of Astoria, Oregon, and the Northwest Marine Terminal Association, all dated December 22, 1960, 3 pages.
38	Letter from Pacific Foreign Trade Steamship Association to Mr. St. Sure, dated June 17, 1960, 1 page.
39	Letter from Pacific Maritime Association to Board of Directors, dated February 9, 1960, 1 page, with 5-page attachment.

Docket Before the Commission

Exhibit No.	*Description*
40	Letter from Pacific Maritime Association to Board of Directors, dated March 6, 1961, 1 page, with 5-page attachment.
41	Letter from Pacific Maritime Association to Board of Directors, dated March 13, 1962, 1 page, with 5-page attachment.
42	First Meeting—New Fund Committee, February 14, 1961, 3 pages.
43	Third Meeting, February 21, 1961, 2 pages.
44	Memo from PMA to Committee Members, dated February 24, 1961, 1 page.
45	Letter from Pacific Maritime Association to PMA Members, dated May 15, 1961, 1 page.
46	Letter from Pacific Maritime Association to Members, dated March 3, 1960, 1 page, with 10-page attachment.
47	Letter from Pacific Maritime Association to Members, dated July 3, 1961, 1 page, with 11-page attachment.
48	Pacific Maritime Association Errata Sheet, dated April 25, 1962, 1 page, with 11-page attachment.
49	Memorandum to K. F. Saysette dated April 22, 1963, 1 page.
50	Letter from Seattle Stevedore Co. to Winchester Agencies, Inc., dated November 30, 1961, 1 page.
[8] 51	Stevedoring order to Marine Terminals Corp., dated February 20, 1961, 1 page.

Docket Before the Commission

Exhibit No.	*Description*
52	Telegram to P. Curtis from Folkscar Traffic, 1 page.
53	Comparison of Certain Cargoes Assessed for Mechanization Fund Purposes on a Measurement Ton Basis, dated April 25, 1963, 1 page.
53A	Method of Computing "Measurement Tonnage in a Single Weight Ton", dated April 25, 1963, 1 page.
54	ILWU Redraft of PMA Document Dated 11/19/57, dated November 27, 1957, 2 pages.
55	Letter from Pacific Maritime Association to Members, dated March 16, 1961, 2 pages, with 5 attachments.
56	Letter from Pacific Maritime Association to Members, dated December 14, 1961, 1 page.
57	Letter from Pacific Maritime Association to Members, dated December 20, 1961, 1 page.
58	Telegram to Automar, Inc., from Volkswagen of America, Inc., 2 pages.

Complaint

(Filed January 29, 1963)

BEFORE THE

FEDERAL MARITIME COMMISSION

[SAME TITLE]

I

COMES NOW the complainant above named, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C., sec. 821) and for its complaint against respondents alleges as follows:

II

At all relevant times complainant was, and now is, a corporation organized and existing under the laws of the Federal Republic of Germany, engaging in that country in the manufacture of automobiles and also in the exportation of part of such automobiles to the United States through the ports of San Francisco and Los Angeles, among others. The address of its principal office is Wolfsburg, Germany.

[2] III

At all relevant times respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) were, and now are, corporations organized and existing under the laws of the State of Nevada, with principal offices in San Francisco and Long Beach, California, respectively. The address of the principal office of the former is 261 Stewart Street, San Francisco 5, California; and of the latter, 920 South Pico Avenue, Long Beach, California. Respondents are engaged in the business of

furnishing terminal services and facilities, including stevedoring services, in connection with common carriers by water, and as such are subject to the provisions of the Shipping Act, 1916. At various times in the past respondents have provided terminal facilities and rendered terminal and stevedoring services to complainant in connection with the discharging of complainant's automobile cargoes at San Francisco and Los Angeles.

IV

Complainant is informed and believes and therefore alleges that at some time on or after January 1, 1961, respondents and other persons, namely, Pacific Maritime Association, a nonprofit corporation organized under the laws of the State of California, and certain members thereof, conspired [3] and agreed or had an understanding or arrangement to impose upon complainant an extra charge for the said terminal and stevedoring services and facilities in the form of an assessment. This assessment is sought to be imposed in order to raise funds for the performance by respondents and the said other persons of the Supplemental Agreement of Mechanization and Modernization, which is described generally in the libel attached hereto as Exhibit A.

V

The said agreement or understanding or arrangement (hereinafter referred to collectively as the "Agreement") to impose the extra charge for terminal and stevedoring services and facilities in the form of an assessment on complainant is subject to the provisions of section 15 of the Shipping Act, 1916 (46 U.S.C., sec. 814) as an agreement "fixing or regulating transportation rates * * * giving or receiving special rates * * * controlling, regulating, preventing, or destroying competition * * * or * * * pro-

viding for an exclusive, preferential, or co-operative working arrangement." As such, the Agreement requires approval by the Federal Maritime Commission before it can be carried out lawfully. Since the Agreement has neither been filed with nor approved by the Commission, it is illegal and void and neither it nor [4] the assessment may be imposed upon complainant.

VI

Moreover, the Agreement is unjustly discriminating and unfair as between shippers and importers, operates to the detriment of the commerce of the United States, is contrary to the public interest and is in violation of sections 16 and 17 of the Shipping Act, 1916 (46 U.S.C., secs. 815 and 816) in that it imposes upon the automobile cargoes of complainant a disproportionately high share of the costs of the plan of the Supplemental Agreement of Mechanization and Modernization in connection with which the assessment is imposed, raising the cost of discharge of complainant's automobile cargoes by approximately twenty-two to thirty-two per cent as against an average increase in the cost of discharge of other cargo of only approximately two and one-half per cent. The Agreement, therefore, should not be approved by the Commission.

VII

For the reasons set forth in paragraph VI hereof, the assessment subjects complainant and its automobile cargoes to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act, 1916 (46 U.S.C., sec. 815).

[5] VIII

For the reasons set forth in paragraph VI hereof, the assessment comprises an unjust and unreasonable practice relating to and connected with the receiving, handling,

storing and delivering of property, in violation of section 17 of the Shipping Act, 1916 (46 U.S.C., sec. 816).

IX

Complainant has at all times maintained the unlawfulness of the assessment as presently sought to be imposed against it by respondents and the said other persons. However, following the filing by Pacific Maritime Association of a libel against respondents on August 14, 1962, respondents, by a petition to implead filed on September 13, 1962, in the United States District Court for the Northern District of California, Southern Division, sought and still seek to collect the said assessment from complainant, in violation of sections 15, 16 and 17 of the Shipping Act, 1916. On November 6, 1962, complainant moved before the said Court for a stay of the proceedings before it, pending a determination by the Commission of the questions of violation of sections 15, 16 and 17 of the Shipping Act, 1916, as matters within the initial and primary jurisdiction of the Federal Maritime Commission. The order granting this stay, [6] pursuant to which the instant complaint is now filed, was issued on November 29, 1962. It was subsequently amended by an order issued on December 11, 1962. Copies of the proceedings in the said Court are attached as exhibits hereto, and are designated: Libel (Exhibit A); Answer to Libel (Exhibit B); Petition to Implead Volkswagenwerk A.G. (Exhibit C); Answer of Complainant (Exhibit D); Motion for a Stay of Proceedings (Exhibit E); Memorandum in Support of Motion of Respondent Impleaded to Stay Proceedings of Complainant (Exhibit F); Libelant's Memorandum of Points and Authorities in Opposition to Motion for Stay (Exhibit G); Respondents' Memorandum in Opposition to Motion for Stay (Exhibit H); Order of United States District Court of November 29, 1962 (Exhibit I); Amendment of De-

cember 11, 1962 to Order of United States District Court (Exhibit J); Stipulated Order Extending Time (Exhibit K).

X

WHEREFORE, complainant prays that respondents be required to answer the charges herein, and that after due hearing and investigation an order be made:

(1) Determining that the Agreement among respondents and the said other persons [7] which imposes an extra charge upon complainant for terminal and stevedoring services and facilities furnished with respect to its automobile cargoes falls within the purview of section 15 of the Shipping Act, 1916, and therefore must be approved by the Commission before it can be lawfully effectuated;

(2) Determining that the Agreement has not been filed with the Commission as provided in the said section 15 and has not been approved by the Commission;

(3) Determining that the Agreement should not be approved by the Commission because it violates the said section 15 in that it is unjustly discriminatory and unfair as between shippers and importers, operates to the detriment of the commerce of the United States and is contrary to the public interest;

(4) Determining that the Agreement should not be approved by the Commission because [8] it violates section 16 of the said Act by subjecting complainant's automobile cargoes to an undue or unreasonable prejudice or disadvantage;

(5) Determining that the Agreement should not be approved because it violates section 17 of the said Act by establishing regulations and practices

which are not just and reasonable as required by that section;

(6) Determining that the Agreement is disapproved;

(7) Ordering respondents to cease and desist from seeking to impose or collect the assessment or extra charge referred to herein; and

(8) Making such other, further and different [9] order or orders as the Commission determines to be proper in the premises.

Dated at San Francisco, California, this day of January, 1963.

Respectfully submitted,

PETER CURTIS,
An Authorized Representative
of Complainant.

Attorneys for Complainant:
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Exhibit A, Annexed to Foregoing Complaint

(Libel)

[1] Edward D. Ransom
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San Francisco 4, California
Telephone: GArfield 1-4600

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

No. 28599 in Admiralty

—o—

PACIFIC MARITIME ASSOCIATION, a non-profit corporation,
Libelant,

v.

MARINE TERMINALS CORPORATION, a corporation; MARINE TERMINALS CORPORATION (OF LOS ANGELES), a corporation; ASSOCIATED-BANNING COMPANY, a corporation; CALIFORNIA STEVEDORE AND BALLAST COMPANY, a corporation; SEATTLE STEVEDORE Co., a corporation; and BRADY HAMILTON STEVEDORE Co., a corporation,

Respondents.

—o—

LIBEL IN PERSONAM

TO THE HONORABLE, THE JUDGES OF THE ABOVE-ENTITLED COURT:

The libel of Pacific Maritime Association, a non-profit corporation, in behalf of itself and in behalf of its member

companies, in a cause based on contract, civil and maritime, alleges:

I.

Libelant, Pacific Maritime Association (hereinafter referred to as "PMA") is now, and at all times herein mentioned was, a non-profit corporation, duly organized and existing under the laws [2] of the State of California, with its principal office in San Francisco, California. Libelant, as such non-profit corporation, is composed of members who are owners or operators of or agents for practically all American flag dry cargo vessels operated in the intercoastal, coastwise and offshore trades with Pacific Coast ports as a terminal or base of operations and of members who are employers of practically all workers engaged in longshore, terminal and related operations in the loading and discharging of dry cargo vessels in Pacific Coast ports. Libelant represents its members in collective bargaining and labor relations with labor unions who in turn represent, for collective bargaining, crew members employed aboard such American flag dry cargo vessels and employees engaged in such longshore, terminal and related operations.

II.

Respondent Marine Terminals Corporation is a corporation organized and existing under the laws of the State of Nevada, with a principal office in San Francisco, California.

Respondent Marine Terminals Corporation (of Los Angeles) is a corporation organized and existing under the laws of the State of Nevada, with a principal office in Long Beach, California.

Respondent Associated-Banning Company is a corporation organized and existing under the laws of the State of

California, with a principal office in Wilmington, California.

Respondent California Stevedore and Ballast Company is a corporation organized and existing under the laws of the State of California, with a principal office in San Francisco, California.

Respondent Seattle Stevedore Co. is a corporation organized and existing under the laws of the State of Washington, with a principal office in Seattle, Washington.

Respondent Brady Hamilton Stevedore Co. is a corporation [3] organized and existing under the laws of the State of Oregon, with a principal office in Portland, Oregon.

Each of the respondents is engaged in the business of performing stevedoring and terminal services and related operations in loading and discharging ocean-going dry cargo vessels calling at various ports of the Pacific Coast of the United States. Each respondent is a member of PMA and is also an Employer as hereinafter designated.

III.

The International Longshoremen and Warehousemen's Union (hereinafter referred to as the "ILWU") is, for the purpose of this libel, the union and certified collective bargaining agent in California, Washington and Oregon for all longshoremen, marine clerks and persons with related classifications who are employed by members of PMA (hereinafter referred to as "Employees"). The ILWU, in behalf of said Employees, and PMA, in behalf of its members employing such Employees, are parties to the Pacific Coast Longshore Agreement, the Master Agreement for Clerks and Related Classifications, and various miscellaneous related labor agreements.

IV.

The ILWU, on behalf of the aforesaid Employees, and PMA, representing its member companies, including each

of respondents, entered into as of January 1, 1961 a Supplemental Agreement on Mechanization and Modernization, which agreement is hereinafter broadly referred to as the "Agreement." This Agreement together with appendices, schedules, trust indentures and trust implementing the Agreement, hereinafter broadly referred to as the "Plan," will be submitted in evidence in this proceeding.

The broad purpose of the Plan is to encourage utilization of modern methods of cargo carriage and handling, including elimination [4] of restrictive work practices and permitting containerization of cargo, so as to permit labor savings and ultimate economy in steamship operations. In order to minimize the hardships which Employees would otherwise suffer as a consequence of the substantial reduction of work opportunities, the Plan was established to provide additional compensation to longshoremen, marine clerks and related classifications (Employees) for their work in loading and discharging of ships and operations related thereto. Such compensation under the Plan is to be paid into a Mechanization Fund collected by PMA and distributed by PMA to three separate trusts, each of which will hold the same for the payment of various benefits to the Employees.

V.

Under the Agreement and the Plan the compensation for the Employees is paid into the Mechanization Fund through contributions by the stevedore and terminal companies (hereinafter sometimes called "Employers"), who are the direct employers of longshoremen, marine clerks and related classifications in Washington, Oregon and California (Employees). The total annual contributions of all such Employers to the Mechanization Fund for a period of five and one-half years is specified in the Agreement, but the power of fixing the method by which the amount of assessments of such contributions from such direct Em-

ployers is determined is reserved to PMA and determined by agreement between PMA members pursuant to the By-Laws of PMA. The source from which such direct Employers of such Employees obtain their respective contributions is left to such Employers to determine.

By duly adopted Resolutions of the Board of Directors binding upon all members thereof, including respondents and each of them, the method by which the PMA assesses the contribution of such direct Employers to the Mechanization Fund for work of stevedoring, terminal [5] and related activities in the loading and discharging of vessels has been determined. Pursuant to such Resolutions of the Board of Directors of PMA assessments have been made.

VI.

By Article III of the aforesaid Agreement libelant is appointed the collecting agent in accumulating the contributions from the direct Employers to the Mechanization Fund. Libelant by said Agreement is further authorized and empowered to take all reasonable action necessary to compel Employers to comply with their obligations under the Agreement, and is further empowered and authorized to commence and pursue such legal remedies as may be appropriate to enforce contributions.

VII.

Respondents, and each of them, are such direct Employers of such Employees, and, accordingly, under the said Agreement and pursuant to such Resolutions each respondent is obligated to pay such additional compensation to such Employees through contributions to libelant, PMA, as vessels are serviced by each respondent, and each of them is accordingly assessed therefor by PMA.

Exhibit A

VIII.

Respondents, and each of them, have been assessed by PMA, as aforesaid, and each has paid contributions to the Mechanization Fund in connection with vessels for which each has performed stevedore and/or terminal and/or related services. However, although assessments have been made by libelant against respondents, and each of them, for other such contributions due, respondents, and each of them, have failed to make such other contributions to the Mechanization Fund, and following demand by PMA has each without lawful reason refused and continues to refuse to do so.

[6] IX.

Libelant has performed all conditions required of it under the aforesaid Plan and its By-Laws and has demanded of respondents, and each of them, that payment be made of the respective delinquent contributions to the Mechanization Fund. Respondents, and each of them, have, nevertheless, failed and refused to make such contributions and continue to fail and refuse to do so. There is now due, owing and unpaid from each respondent to libelant, PMA, as collection agent for said Mechanization Fund, the sum set opposite the name of each respondent as follows, no part of which has been paid:

Marine Terminals Corporation	$30,687.43
Marine Terminals Corporation (of Los Angeles)	36,316.84
Associated-Banning Company	3,740.31
California Stevedore and Ballast Company	2,170.00
Seattle Stevedore Co.	6,240.87
Brady Hamilton Stevedore Co.	6,551.41
	$85,706.86

Exhibit A

X.

Obligations of respondents to make such contributions as aforesaid accrue, and will continue to accrue, as each respondent services vessels as hereinabove described. Although each respondent has paid a part of such contributions and libelant is informed and believes will continue to do so as the same accrues, libelant is informed and believes that each respondent will continue to refuse to pay part of such contributions as the same accrue. The amount set out in Article IX above is the current delinquency of each. Libelant, therefore, prays leave to amend this libel at time of trial of this case to insert the amount of such delinquency then current as to each respondent.

XI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[7] WHEREFORE, libelant prays that process in due form of law according to the practices of this Court in cases of admiralty may issue against each respondent. That each respondent be cited to appear and answer all and singular the matters aforesaid, and that this Court may be pleased to decree the payment of libelant's claim as to each respondent in the amounts aforesaid, together with interest and costs, and that libelant may have such other and further relief as to the Court may seem proper.

Dated: August 13th, 1962.

EDWARD D. RANSOM,
GARY J. TORRE,
LILLICK, GEARY, WHEAT, ADAMS & CHARLES,
Proctors for Libelant, Pacific
Maritime Association.

Exhibit B, Annexed to Foregoing Complaint

(Answer to Libel)

[1] McCutchen, Doyle, Brown & Enersen
Russell A. Mackey
Bryant K. Zimmerman
601 California Street
San Francisco 8, California
Telephone: YUkon 1-3400
Proctors for respondents
Marine Terminals Corporation and
Marine Terminals Corporation
(of Los Angeles)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

[SAME TITLE]

ANSWER TO LIBEL

Come now respondents Marine Terminals Corporation, a corporation and Marine Terminals Corporation (of Los Angeles) a corporation, and answering the libel herein admit, deny and allege as follows:

I.

Admit the allegations of Article I.

II.

Admit the allegations of Article II, so far as applicable to these respondents.

Exhibit B

[2] III.

Admit the allegations of Article III.

IV.

Admit the allegations of Article IV.

V.

Admit the factual allegations of Article V and allege that the assessments for the benefit of the Mechanization Fund are made on the understanding that the employer can lawfully collect the amount of the assessment from the carrier or cargo owner for whom the employer performs the stevedore and terminal services.

VI.

Admit the allegations of Article VI.

VII.

Admit the factual allegations of Article VII.

VIII.

Admit that they have paid contributions to the Mechanization Fund in connection with services relating to all vessels other than certain vessels carrying automobiles, particularly vessels chartered to Volkswagenwerk A.G., which contends that the Supplemental Agreement on Mechanization and Modernization, and assessments thereunder are unlawful and that neither libelant nor respondents can lawfully collect assessments pursuant to said Agreement.

IX.

Admit that they have not paid assessments in those cases where the carrier or cargo owner have contended that the assessments are unlawful.

Exhibit B

X.

No answer required.

XI.

Admit the maritime jurisdiction of this court.

[3] WHEREFORE, respondents pray that the court determine the lawfulness of the said Supplemental Agreement on Mechanization and Modernization and the assessments thereunder and give such relief as to the court may seem proper.

Dated: September , 1962.

.....

McCUTCHEN, DOYLE, BROWN & ENERSON

.....

RUSSELL A. MACKEY

.....

BRYANT K. ZIMMERMAN

Exhibit C, Annexed to Foregoing Complaint

(Petition to Implead Volkswagenwerk A.G.)

[1] McCutchen, Doyle, Brown & Enersen
Russell A. Mackey
Bryant K. Zimmerman
601 California Street
San Francisco 8, California
Telephone: YUkon 1-3400
Proctors for respondents and petitioners
Marine Terminals Corporation and Marine
Terminals Corporations (of Los Angeles)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
No. ———— in Admiralty

—o—

Pacific Maritime Association, a non-profit corporation,
Libelant,

vs.

Marine Terminals Corporation, a corporation; Marine Terminals Corporation (of Los Angeles), a corporation; Associated-Banning Company, a corporation; California Stevedore and Ballast Company, a corporation; Seattle Stevedore Co., a corporation; and Brady Hamilton Stevedore Co., a corporation,

Respondents.

Marine Terminals Corporation, a corporation; and Marine Terminals Corporation (of Los Angeles), a corporation,
Petitioners,

vs.

Volkswagenwerk A.G., a corporation,
Respondent impleaded.

—o—

Exhibit C

The petition of respondents and petitioners Marine Terminals [2] Corporation, a corporation and Marine Terminals Corporation (of Los Angeles), a corporation, against Volkswagenwerk A.G., in a cause of contract civil and maritime, allege as follows:

I.

That at all times herein mentioned petitioners Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), were and are corporations organized and existing under the laws of the State of Nevada, with principal offices in San Francisco and Long Beach, respectively.

II.

At all times herein mentioned Volkswagenwerk A.G. was and now is a corporation organized and existing under the laws of Germany with its principal office at Wolfsburg, Germany.

III.

At various times subsequent to January 1, 1961, petitioners have rendered stevedore and terminal services to Volkswagenwerk A.G. in connection with various vessels discharging automobiles at San Francisco and Los Angeles. On account of said services, Pacific Maritime Association has demanded payment of certain amounts as assessments under the Supplemental Agreement on Mechanization and Modernization. Said assessments now amount to approximately $75,000. Attached hereto is a copy of the Libel filed by Pacific Maritime Association to collect said assessments.

Volkswagenwerk A.G. has agreed to pay each of said assessments as part of petitioners' compensation for said stevedore and terminal services, but has failed and refused to make payments in accordance with said agreement, on the ground that the said Supplemental Agreement on

Exhibit C

Mechanization and Modernization and assessments thereunder are unlawful.

IV.

[3] All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

WHEREFORE, petitioners pray that process in due form of law according to the practice of this court in cases of admiralty and maritime jurisdiction may issue against Volkswagenwerk A.G., that said respondent impleaded be cited to appear and answer all of the matters aforesaid and that this court may be pleased to determine the lawfulness of the said Supplemental Agreement on Mechanization and Modernization and assessments thereunder and to decree that said respondent impleaded pay any amounts which petitioners may be required to pay to libelant Pacific Maritime Association, together with interest and costs, and that petitioners may have such other and further relief as to the court may seem proper.

Dated: September , 1962.

.....

McGUTCHEN, DOYLE, BROWN & ENERSEN

.....

RUSSELL A. MACKEY

.....

BRYANT K. ZIMMERMAN

Exhibit D, Annexed to Foregoing Complaint

(Answer of Complainant)

[1] Graham James & Rolph
Boris H. Lakusta
Alexander D. Calhoun, Jr.
310 Sansome Street
San Francisco 4, California
YUkon 6-2171

Herzfeld & Rubin
Walter Herzfeld
40 Wall Street
New York 5, New York

Proctors for Respondent-Impleaded,
Volkswagenwerk Aktiengesellschaft

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

[Same Titles]

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[2] Comes Now Volkswagenwerk Aktiengesellschaft, named herein as Volkswagenwerk A.G., and in answer to the libel and impleading petition on file herein admits, denies and alleges as follows:

Answer to Allegations of Libel

I.

Answering Paragraph I of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

Exhibit D

II.

Answering Paragraph II of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

III.

Answering Paragraph III of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

IV.

Answering Paragraph IV of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

V.

Answering Paragraph V of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

VI.

Answering Paragraph VI of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

VII.

Answering Paragraph VII of the libel, respondent impleaded [3] is without knowledge or information sufficient to form a belief as to the averments thereof.

VIII.

Answering Paragraph VIII of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

Exhibit D

IX.

Answering Paragraph IX of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

X.

Answering Paragraph X of the libel, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

XI.

Answering Paragraph XI of the libel, respondent impleaded denies the jurisdiction of this Court to determine the validity of the claim of libelant against respondents-petitioners until the validity of the contributions sought to be collected from respondents-petitioners to the extent that they may affect respondent impleaded is determined by the Federal Maritime Commission pursuant to the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq. (1961).

ANSWER TO ALLEGATIONS OF PETITION TO IMPLEAD

I.

Answering Paragraph I of the impleading petition, respondent impleaded is without knowledge or information sufficient to form a belief as to the averments thereof.

II.

Answering Paragraph II of the impleading petition, respondent impleaded admits the allegations thereof, except that [4] the correct corporate name of respondent impleaded is Volkswagenwerk Aktiengesellschaft.

Exhibit D

III.

Answering Paragraph III of the impleading petition, respondent impleaded admits respondents-petitioners have rendered stevedoring and terminal services to respondent impleaded in connection with various vessels discharging automobiles in San Francisco and Los Angeles; admits that the Pacific Maritime Association has demanded of respondents-petitioners and respondents-petitioners have demanded of respondent impleaded payment of certain amounts as assessments under the said Supplemental Agreement on Mechanization and Modernization; admits that said assessments do now amount to approximately $75,000.00; admits that respondent impleaded has failed and refused to pay such assessments to respondents-petitioners on the ground they are unlawful; and, except as herein expressly admitted, denies each and every, all and singular, the allegations thereof.

IV.

Answering Paragraph IV of the impleading petition, respondent impleaded denies the jurisdiction of this Court to determine the validity of the claim of respondents-petitioners against respondent impleaded until the validity of the assessments sought to be imposed against respondent impleaded is determined by the Federal Maritime Commission pursuant to the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq. (1961).

FIRST AFFIRMATIVE DEFENSE TO LIBEL AND PETITION TO IMPLEAD

Libel and petition to implead fail to state a claim upon which relief can be granted.

Exhibit D

SECOND AFFIRMATIVE DEFENSE TO LIBEL AND PETITION TO IMPLEAD

I.

Respondent impleaded does not oppose, indeed supports, [5] the objectives of libelant's Plan for the purposes of encouraging introduction of modern methods of cargo carriage and handling, including elimination of restrictive work practices and permitting containerization of cargo as alleged in Article IV of the libel. Moreover, respondent impleaded would be willing to be charged with lawful, nondiscriminatory, just and reasonable contributions to the costs of the said Plan.

II.

Respondent impleaded is informed and believes and on the basis of such information and belief alleges that respondents-petitioners and other persons agreed and conspired to impose upon respondents-petitioners the contributions referred to in Paragraph IX of the libel, and upon respondent impleaded the assessments referred to in Paragraph III of the impleading petition as a charge for respondents-petitioners' stevedoring and terminal services.

III.

Respondents-petitioners and the other persons referred to in Paragraph II, above, are persons subject to the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq. (1961).

IV.

Respondents-petitioners and the other persons referred to in Paragraph II, above, are required by Section 15 of the said Act to file with the Federal Maritime Commission for approval all agreements controlling, regulating, pre-

venting, or destroying competition, or in any manner providing for an exclusive, preferential, or co-operative working arrangement, which includes the fixing of charges for services.

V.

The agreement and conspiracy to impose upon respondents-petitioners the contributions and upon respondent impleaded the assessments referred to in Paragraph II, above, is an agreement [6] requiring Section 15 approval by the Federal Maritime Commission; the said agreement has neither been filed with nor approved by the Commission and is therefore illegal and void and cannot lawfully be carried out.

VI.

The determination of whether respondents-petitioners and the other persons referred to in Paragraph II, above, have entered into an agreement subject to Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq. (1961), as hereinabove alleged, is a matter within the primary jurisdiction of the Federal Maritime Commission, and, accordingly, the issue of the validity of the contributions and assessments under Section 15 should be referred to the Commission and this libel and petition to implead dismissed or stayed until the decision of the Commission.

THIRD AFFIRMATIVE DEFENSE TO LIBEL AND PETITION TO IMPLEAD

I.

Respondent impleaded refers to Paragraphs I, II and III of its Second Affirmative Defense and incorporates the same herein by such reference.

Exhibit D

II.

Respondents-petitioners and the other persons referred to in Paragraph II of the Second Affirmative Defense of respondent impleaded, and each of them, are subjecting the automobile cargoes of respondent impleaded to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961), by imposing upon respondent impleaded the said assessments as a charge for terminal and stevedoring services rendered in connection with this particular description of cargo, to the extent that respondent impleaded's automobile cargoes are thereby burdened with a disproportionate [7] share of the costs of the Plan referred to in Article IV of the libel as compared with other cargoes.

III.

The determination of whether the said assessments are in violation of Section 16 as hereinabove alleged is a matter within the primary jurisdiction of the Federal Maritime Commission and, accordingly, the issue of the validity of the assessments under Section 16 should be referred to the Commission and the libel and petition to implead dismissed or stayed until the decision of the Commission.

FOURTH AFFIRMATIVE DEFENSE TO LIBEL AND PETITION TO IMPLEAD

I.

Respondent impleaded refers to Paragraphs I, II and III of its Second Affirmative Defense and incorporates the same herein by such reference.

II.

The practices of respondents-petitioners and the other persons referred to in the Second Affirmative Defense of

respondent impleaded, and each of them, in attempting to impose upon respondent impleaded the said assessments as a charge for terminal stevedoring services are unjust and unreasonable practices in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961), to the extent that respondent impleaded's automobile cargoes are thereby burdened with a disproportionate share of the costs of the Plan referred to in Article IV of the libel as compared with other cargoes.

[8] III.

The determination of whether the said practices are in violation of Section 17 as hereinabove alleged is a matter within the primary jurisdiction of the Federal Maritime Commission and, accordingly, the issue of the validity of the practices under Section 17 should be referred to the Commission and the libel and petition to implead dismissed or stayed until the decision of the Commission.

FIFTH AFFIRMATIVE DEFENSE TO LIBEL AND PETITION TO IMPLEAD.

I.

Respondent impleaded refers to Paragraphs I, II and III of its Second Affirmative Defense and incorporates the same herein by such reference.

II.

By reason of the foregoing agreement and conspiracy, respondents-petitioners and the other persons referred to in the Second Affirmative Defense of respondent impleaded seek to impose upon respondent impleaded a fixed charge in the form of an assessment in restraint of trade and commerce with foreign nations in violation of Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. Section 1.

Exhibit D

WHEREFORE, respondent impleaded prays that respondents-petitioners take nothing by their petition to implead and that respondent impleaded have its costs herein; and that respondent impleaded have such other and further relief as the Court may deem proper.

[9] Dated at San Francisco, California, this 31st day of October, 1962.

GRAHAM JAMES & ROLPH

By ALEXANDER D. CALHOUN
Proctors for Respondent Impleaded, Volkswagenwerk Aktiengesellschaft

HERZFELD & RUBIN
WALTER HERZFELD
of Counsel.

Answer to Complaint

(Filed February 18, 1963)

[1] BEFORE THE

FEDERAL MARITIME COMMISSION

[SAME TITLE]

Respondents Marine Terminals Corporation and Marine Terminal Corporation (of Los Angeles) answer the complaint herein as follows:

I

Deny that complainant is entitled to bring this proceeding under Section 22 of the Shipping Act, 1916.

II

Admit the allegations of Paragraph II.

III

Admit that respondents were and are Nevada corporations with principal offices in San Francisco and Long Beach, as alleged; admit that they are in the business of furnishing terminal and stevedoring services; admit that such services are, in some cases, [2] furnished in connection with common carriers by water; admit that such services have been provided to complainant in connection with discharging its automobile cargoes at San Francisco and Los Angeles, but deny that such services were rendered in connection with common carriers by water; and except as herein admitted or alleged, deny the allegations of Paragraph III; and further allege that the Commission

has no jurisdiction over these respondents, which are not common carriers, do not furnish terminal facilities and are not "other persons subject to" the Shipping Act, 1916.

IV

Admit that they are members of Pacific Maritime Association, a non-profit corporation organized under the laws of the State of California; admit that they have included as part of their charges for services the amounts of assessments under the Supplemental Agreement on Mechanization and Modernization; and except as herein admitted, deny the allegations of Paragraph IV.

V

Deny the allegations of Paragraph V.

VI

Deny the allegations of Paragraph VI.

VII

Deny the allegations of Paragraph VII.

VIII

Deny the allegations of Paragraph VIII.

[3] IX

Admit that complainant has maintained that assessments under the Supplemental Agreement on Mechanization and Modernization are unlawful; admit that they impleaded complainant in the suit in the United States District Court commenced by Pacific Maritime Association; admit that they have sought and still seek to collect from complainant the assessments pursuant to said agree-

ment; admit that complainant moved for and obtained a stay of proceedings in the United States District Court; admit the filing of the documents attached to the complaint as Exhibits A-K; and except as herein admitted, deny the allegations of Paragraph IX.

WHEREFORE, respondents pray that the Commission determine that it has no jurisdiction with respect to the matters alleged in the complaint, that the complaint be dismissed, and that the respondents have such other and further relief as may be appropriate.

Dated: February 15, 1963.

.....

McCUTCHEN, DOYLE, BROWN & ENERSEN

.....

BRYANT K. ZIMMERMAN
Attorneys for Respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles)

Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

(Filed February 21, 1963)

[1] BEFORE THE

FEDERAL MARITIME COMMISSION

[SAME TITLE]

Pacific Maritime Association (PMA) is a non-profit association existing under the laws of the State of California with its principal office in San Francisco, California, formed for the primary purpose of representing its members in collective bargaining and labor relations with labor unions who in turn represent for collective bargaining crew members employed aboard American-flag dry cargo vessels and employees engaged in longshore, terminal and related operations.

Rule 5(n) of the Commission's Rules of Practice and Procedure provide that a petition for intervention shall set forth the interest of petitioner, the grounds of the proposed intervention and the position of the petitioner in the proceeding. This petition shall proceed to do so.

[2] *Petitioner's Substantial Interest and Grounds for Intervention*

Pacific Maritime Association's substantial interest in the captioned complaint proceedings and grounds for intervention include the following:

1. The proceeding could possibly affect the entire $29,000,000 Mechanization and Modernization program negotiated between the PMA and the longshore union.

Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

2. The Complaint could possibly result in the Federal Maritime Commission for the first time in its history assuming jurisdiction in the field of maritime collective bargaining, which petitioner firmly believes is beyond the jurisdiction of the Commission and which would adversely affect the industry by upsetting traditional patterns of collective bargaining.

3. It is alleged in the Complaint that the named respondents and PMA and certain members thereof have entered into a conspiracy, agreement or understanding to impose charges upon complainants. As direct charges are thus made against petitioner, petitioner should be permitted to participate and have the opportunity to prove such charges false.

4. The Complaint alleges that petitioner, PMA, and respondents have entered into an unfiled and unapproved Section 15 agreement and thereby violated the Shipping Act, 1916. Petitioner through intervention should be afforded the right to contest such allegations.

5. The Complaint alleges agreements between petitioner, its members and respondents resulting in violations of Sections [3] 16 and 17 of the Shipping Act, 1916, and petitioner through intervention should be afforded the right to prove such charges false.

6. Petitioner, PMA, commenced the litigation in the District Court of the United States for the Northern District of California, Southern Division, by a libel against respondents here for collection of contributions due to the aforesaid Fund. That action has been stayed in order to permit complainants to proceed with this complaint proceeding. Petitioner's rights to collect sums due are, accordingly, stayed pending this litigation and petitioner

Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

should be entitled to participate in this complaint proceeding in order to protect its rights in the District Court and to protect itself against undue delay in disposition of this proceeding.

Background of Complaint Action

The Complaint seeks to invoke the jurisdiction of the Federal Maritime Commission with respect to collective bargaining negotiations and agreements as to which the Commission has no authority, has never heretofor and should not now inject itself.

The PMA, representing maritime employers, and the International Longshoremen & Warehousemen's Union (ILWU), representing employees, bargain with each other with respect to wages, hours, working conditions and fringe benefits, including vacation, welfare and pension plans. In such negotiations the Union contended that containerization, palletization and other modern [4] methods of cargo handling which had recently been introduced and were being introduced resulted in a reduction of work of longshore and marine clerk employees. In order to satisfy the Union and permit the mechanization and modernization program to go forward, there was negotiated over a period of many months a complex program which would result in a $29,000,000 fund accumulated during a period of five years for the benefit of such workers. This fund is entitled the "PMA-ILWU Mechanization and Modernization Fund" (the Fund). The agreement to provide such Fund was negotiated and entered into between PMA on behalf of its members, and the ILWU on behalf of its members, in the same way that wage raises, vacation allowances and other fringe benefits are negotiated.

The methods by which the PMA would raise such funds was the subject of long and intensive study. It was finally determined by agreement between the members of the PMA

that the contributions making up the Fund would be made by the stevedoring companies, who are the direct employers of longshore labor, on the basis of 27½¢ per ton, weight or measurement, handled by such stevedoring companies and would be contributed by the direct employers of marine clerks on a manhour basis (historic distinctions relating to bulk and certain coastwise lumber cargoes were of necessity recognized and a different rate applied). There is not and never has been any agreement between the PMA or anyone else or between the members of PMA as to the source from which the members who are such direct employers would derive the funds with which to make such contributions. Whether such [5] employers would absorb such contributions or would bill and collect all or any part to their customers, is entirely a matter for such direct employers.

Several members of PMA became delinquent in their contributions and in order to collect such delinquencies PMA brought a libel in admiralty in the United States District Court against respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) and others. Respondents answered stating in effect they considered such contributions were valid and were due and owing by them but they had endeavored to obtain their contributions to the Fund by charging the amount thereof against their customers and that one such customers, Volkswagenwerk Aktiengesellschaft, complainant in this proceeding, had not paid and had contended such charges against them were in violation of the Shipping Act, 1916. Respondents therefore impleaded complainant Volkswagenwerk, who moved for and obtained the stay order previously referred to. Both respondents in the proceeding and petitioner, PMA, contested the motion for stay on the grounds that the matters alleged are not within the jurisdiction of the FMC. It should be noted that the order of

Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

the United States District Court (Exhibit I to the Complaint) is based primarily on the grounds that it is up to the Federal Maritime Commission itself rather than the District Court to determine whether it has jurisdiction over the matters claimed by complainant.

[6] *Position of Petitioner*

1. The subject matter of the Complaint is outside the jurisdiction of the Federal Maritime Commission. As appears from the foregoing sketch of the background of the proceeding, the Complaint could involve the FMC in maritime labor relations and collective bargaining. The charges which respondents have assessed against complainant are in fact no different from charges which could result from a wage increase, change in authorized union holidays, extension of vacation periods, welfare funds, or any other increased costs which a stevedore company might add to its bills to its customers as result of collective bargaining between the employers and unions. This is a subject over which the FMC is not granted jurisdiction by Congress and is, we believe, a subject as to which the FMC would not presume to undertake to regulate.

2. Petitioner states positively and without equivocation in this verified petition that there is not and never has been any agreement, understanding or arrangement between respondents and petitioner or between any direct employers of the longshore and marine clerk labor and PMA and/or between any members thereof to impose upon complainant or upon the automobile cargoes of complainant any charge or assessment whatever, whether relating to the contributions which the direct employers make into the Mechanization and Modernization Fund or otherwise. In view of petitioner's positive denial that any such agreement or understanding exists, any question as to whether

if such an agreement did exist it would be subject to the jurisdiction of [7] the Commission under Section 15 is moot, but petitioner's further position, as an academic matter, is that such an agreement would not be within Section 15.

The agreements relating to the Mechanization & Modernization Fund which do exist, namely, the agreement between the PMA and the ILWU, to establish the Fund, and the intra-association agreement between its members for contributions to the Fund, are so clearly outside Section 15 considerations as to make discussion thereof absurd, nor are there any allegations of the Complaint with respect to such agreements.

3. The Federal Maritime Commission through its staff has investigated and resolved the contention of a Section 15 agreement apparently to its satisfaction. By letter of September 28, 1961, Mr. Stigler, then Chief, Office of Regulations, Federal Maritime Commission, made inquiry concerning the Mechanization & Modernization Fund. A copy of that letter is attached as Exhibit A. The inquiry was subsequently followed by a letter of Mr. Leroy Fuller, Director, Bureau of Foreign Regulations. At the time of the original inquiry the plan was still in its formative stage. The Commission's inquiries were answered in full by letter of December 14, 1961. Copy attached hereto as Exhibit B. No further communication was received from the Commission concerning the matter.

4. The allegations of the Complaint and the prayer of the Complaint charging respondents with alleged violations of Sections 16 and 17 of the Shipping Act, 1916, are based upon [8] the alleged agreement between respondents and PMA and its members to assess charges against complainant allegedly disproportionate to charges assessed against other cargo resulting in a claim of unjust dis-

Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

crimination under Section 16 and unreasonable practice under Section 17. Petitioner reiterates its denial that any such agreement exists. The method of allocation by PMA to obtain contributions to the Fund, including the contributions of respondents here, is in fact not challenged by the Complaint and is, in any event, outside the jurisdiction of the Commission. Petitioner alleges, nevertheless, that the method of allocation of contributions adopted after months of study was designed to and does in fact treat all carriers and cargo alike. It is in fact the most feasible plan which could be devised to avoid discriminatory treatment. The method by which the members of PMA pass on, if at all, such additional expense is, as previously stated, no concern of petitioner.

WHEREFORE, petitioner prays:

1. That its Petition to Intervene be granted.

2. That the Commission determine that it has no jurisdiction with respect to the matters set forth in the Complaint.

3. That the Complaint be dismissed.

Dated at San Francisco, California, February 18, 1963.

PACIFIC MARITIME ASSOCIATION,
Petitioner

By J. Paul St. Sure
J. PAUL ST. SURE
President

Edward D. Ransom
EDWARD D. RANSOM
GARY J. TORRE
Gary J. Torre

Lillick, Geary, Wheat, Adams & Charles
LILLICK, GEARY, WHEAT, ADAMS & CHARLES
Attorneys for Petitioner

Exhibit A, Annexed to Foregoing Petition

[1] FEDERAL MARITIME COMMISSION
Washington 25, D. C.

In reply refer to:
Li7-3(26):079
September 28, 1961

RECEIVED
Oct. 2, 1961
Pacific Maritime Association

Air Mail
Pacific Maritime Association
16 California Street
San Francisco, California

Gentlemen:

It is our understanding that the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union have entered upon an arrangement whereby the Pacific Maritime Association members have agreed to provide approximately $5,000,000 a year for five years in the establishment of a modernization and improvement fund for the benefit of above-mentioned union.

It is further our understanding that the method used to financially provide for the fund is by *assessment* of an arbitrary of 27½¢ per ton weight or measurement *against all cargo* discharged at west coast terminals. Please inform this Office of the manner in which this assessment is billed, i.e., against whom is the assessment made, what is it called, and how is it brought to the attention of the person paying it. Further please let us know whether this assessment is published in any individual common carrier, conference, or terminal tariffs.

Exhibit A

We presume that the 27½¢ charge was arrived at by agreement among all of the members of the Pacific Maritime Association. Such agreement to fix a rate appears to be cognizable by section 15 of the Shipping Act, 1916. It is, therefore, requested that the Pacific Maritime Association file with this Commission a true copy, or, if oral, a true and complete memorandum of the agreement wherein its members by cooperative arrangement agreed to the assessment of the rate as noted above.

Additionally, we request that you provide this Office with a copy of the contract between the International Longshoremen's and Warehousemen's Union and Pacific Maritime Association for the current year, bylaws of the Pacific Maritime Association, membership record of the Pacific Maritime Association, and a copy or memorandum of the Pacific Maritime Association's authorization to its officials to negotiate with the International Longshoremen's and Warehousemen's Union.

You may wish to have your attorney provide us with his opinion regarding the agreement herein under discussion.

[2] Upon receipt of the referred to agreement, it will be examined with respect to compliance with said Section 15, copy of which is enclosed.

Sincerely yours,

WILLIAM A. STIGLER
William A. Stigler
Chief, Office of Regulations

Enclosure

Exhibit B, Annexed to Foregoing Petition

[1] (Letterhead of)

LILLICK, GEARY, WHEAT, ADAMS & CHARLES
Attorneys at Law
San Francisco 4, California

December 14, 1961

Mr. Leroy F. Fuller
Director, Bureau of Foreign Relations
Federal Maritime Commission
Washington 25, D. C.

Re: PMA Mechanization Plan
Your Ref.: L17-3(26):30

Dear Mr. Fuller:

The procedures with respect to the PMA-ILWU Mechanization Fund have been sufficiently determined to permit us now to reply fully to Mr. Stigler's letter of September 28, 1961 addressed to the Pacific Maritime Association. We, as counsel for PMA, have been intimately acquainted with the mechanization plan since its inception and PMA has, accordingly, referred your inquiry to us.

We believe the information which you have apparently received concerning this program has necessarily led to a misunderstanding of its basic concepts. From your letter it would appear that it is your understanding there will be a direct assessment, of 27½¢ per ton, weight or measurement, against shippers or consignees of cargo in the nature of a tariff item concerning which there is some understanding or agreement between carriers. If this is your understanding, you have been misinformed.

The Pacific Maritime Association (PMA) is an association comprised of employers who designate it to represent

them for the purpose of collective bargaining with various maritime unions, including the International Warehousemen & Longshoremen's Union (ILWU). The PMA, representing the employers, and the ILWU, representing employees, bargain with respect to wages, hours, working conditions and fringe benefits, including vacations, welfare and pension plans for the benefit of longshoremen and marine clerks. The mechanization and modernization fund to be established for longshoremen and marine clerks is but one of many fringe benefits that have been negotiated or are being negotiated by the PMA and ILWU.

[2] The plan in question is complex. In essence it is that over a period of five and one-half years there will be contributed to the fund by the employers a total of $29,000,000 for the employees' benefit. Since a minor portion of these employees are in the category of marine clerks, the stevedore companies, who are the direct employers of the longshoremen, will be contributing into the fund at a ratio of about 8 to 1 in relation to terminal companies, who are the direct employers of the marine clerks.

In the initial planning the fund was to be raised by the direct employers of the employee-beneficiaries on a tonnage basis, it being considered that the goal would be reached by payment into the fund of a total of 27½¢ per ton of general cargo and a lesser rate for bulk cargoes. This system has been revised, so that employers of marine clerks will contribute on a manhour basis and by employers of longshoremen on a tonnage basis; the statistical result being the total equivalent of 27½¢ per ton at present. It can be readily seen that the rate of contribution during the five and one-half year period may adjust up or down depending upon the volume of traffic.

There is no agreement between PMA and the ILWU nor between the PMA members as such as to how the direct employers of the longshoremen are to raise the funds for their contributions. Realistically, it is expected they will,

where possible, pass this on to the ocean carriers. How this is passed on to the carrier, if at all, is a matter of individual contract between the stevedore company and the steamship company, or in the case of f.i.o. charters, between the stevedore company and the charter-shipper. In most instances, it is probably a simple matter for the stevedore companies to add the amount per ton for the mechanization fund, specified as such, directly on their invoices to the ocean carrier for whom the cargo is handled in the same way as other items of employee benefits, such as welfare, pension and vacation costs. If the stevedore is not able to obtain an agreement with his customer to reimburse him for this item, he will have to absorb it because he will nevertheless owe the contribution to the fund.

Essentially the same situation pertains with respect to the terminal companies' contribution relating to marine clerks. How the clerks' employers raise the fund is no part of any agreement or understanding with the ILWU or with PMA. Some may decide to absorb the amount and others to pass it on to the carriers. It can be expected that those who are members of the California Association of Port Authorities will determine [3] this matter as an association within their Section 15 agreement. Just how this might be reflected in the terminals' tariffs, if at all, has not to or knowledge been determined by them.

With respect to the ocean carriers which may bear the ultimate cost of the mechanization fund, that item is no different than vacation, welfare, pension, unemployment insurance and other similar items of costs which the ocean carrier pays directly to a stevedoring company or which are included within the charges paid to terminal companies in connection with loading or discharging ships. It will increase initially the cost to the carriers of transporting cargo, just as an increase in wages increases such costs. However, the mechanization and modernization agreement is for the purpose of facilitating mechanization of cargo

handling and eliminating restrictive work practices with the expectation of ultimate economies in the carriers' operations.

The PMA and the ILWU are not involved in, or directly concerned with, the source from which ocean carriers derive the amounts which may be paid by the carriers to the stevedoring or terminal companies. There is no agreement or understanding, formal or informal, between the PMA and ILWU or between the members of the PMA as to the source from which the carriers will obtain the funds to pay this increased cost. Any changes in carriers' rates resulting directly or indirectly from this cost would be a matter for usual rate making procedures through conferences, but is no part of a PMA function and does not relate to membership in PMA.

The memorandum of agreement on mechanization and modernization between PMA and ILWU is not between two parties subject to the Shipping Act, 1916, as amended. So far as we have been able to ascertain, an agreement between parties subject to the Act to form an association of employers, such as PMA, to represent them for the purpose of collective bargaining with unions representing off-shore or shoreside workers or collective agreements reached thereafter as to wages, benefits or working conditions, have never even been suggested as falling within the scope of Section 15. If a contrary view is now adopted, the Federal Maritime Commission will embark on the unique undertaking of passing on all collective bargaining agreements and labor dispute settlements in the shipping industry. While such an agreement, like any agreement of any kind between carriers, is necessarily a "cooperative working agreement," it is neither remotely connected with, nor bears any resemblance to, the rate making anti-trust matters specifically recited in Section 15 and at which the section is aimed.

Exhibit B

We believe that the foregoing explanation should satisfy you that the modernization and mechanization plan is [4] far removed from any considerations with respect to Section 15. As a result of apparent misinformation about the plan and the Association you have asked for a number of documents and records which we are enclosing. So that you may be fully conversant with the mechanization and modernization plan, its background and operation, we are enclosing copies of a number of other documents which we think may be pertinent. The enclosures are as follows:

1. Memorandum of Agreement on Mechanization and Modernization, 10/18/60
2. ILWU-PMA Supplemental Agreement on Mechanization and Modernization, Schedules A, B and C thereof
3. ILWU-PMA Welfare Fund Supplemental Declaration of Trust
4. ILWU-PMA Vesting Benefit Trust—Trust Indenture
5. ILWU-PMA Supplemental Wage Benefit Trust—Trust Indenture
6. Two ILWU-PMA Letter Agreements dated November 15, 1961
7. U. S. Treasury Department letter to Schirmer Stevedoring Co., Ltd. 9/15/61 (We believe this letter contains a concise summary of the program.)
8. U. S. Treasury Department letter to States Steamship Company 9/15/61
9. Copy of By-Laws of PMA
10. List of members of PMA subject to the Modernization Agreement.

Exhibit B

We trust that these documents together with our comments herein answer the inquiry contained in your letter of September 28, 1961. If there is any further information you require, please advise. Otherwise, we should appreciate your advising us of your concurrence in our views that neither the mechanization and modernization plan nor its operation fall within the scope of Section 15.

Very truly yours,

LILLICK, GEARY, WHEAT, ADAMS & CHARLES
EDWARD D. RANSOM

Encs.
8-12-20129
cc: PMA

Attn: Mr. Press Lancaster

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

(Filed March 8, 1963)

[1] BEFORE THE

FEDERAL MARITIME COMMISSION

[SAME TITLE]

Complainant replies to the allegations of the petition to intervene of Pacific Maritime Association (PMA) as follows:

I

Complainant is without knowledge or information sufficient to form a belief with respect to the truth of the description which PMA gives of itself in the first paragraph of its petition.

II

With respect to the allegations under the heading "Petitioner's Substantial Interest and Grounds for Intervention" complainant denies the allegations of paragraphs 1 and 2 under such heading; avers, as is alleged in the Complaint and as is [2] more particularly set forth below, that its complaint is directed solely against the imposition upon complainant of an excessive and discriminatory charge for terminal and stevedoring services and facilities to raise amounts required for the performance of PMA's agreement with the International Longshoremen & Warehousemen's Union (ILWU).

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

III

With respect to the allegations under the heading "Background of Complaint Action" complainant:

(1) Denies the allegations of the first paragraph under such heading;

(2) Replying to the second paragraph under such heading, admits the making of an agreement between PMA and ILWU for the creation of a so-called "PMA-ILWU Mechanization and Modernization Fund" (the Fund); denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the second paragraph under such heading;

(3) Replying to the third paragraph under such heading, admits that an agreement or understanding or arrangement was made among respondents, PMA and certain members of PMA as to how the contributions to the Fund would be made; admits that the contributions for bulk cargo and certain coastwise lumber cargoes were assessed [3] at different rates or by different methods than other cargo, including vehicles; avers that although distinctions relating to bulk and certain lumber cargoes were made by PMA, no such distinction was recognized as to unboxed automobiles, although, as PMA and respondents knew, the unboxed automobiles of complainant were and are discharged by stevedores and terminals at a per unit cost; avers that the assessment for the Fund against complainant's automobiles were made on a measurement basis, which, if passed on by respondents to complainant, results in a disproportionately high, discriminatory and ex-

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

cessive charge against such automobiles; avers that the necessary and inevitable effect and result of such agreement or understanding or arrangement, as is more particularly set forth below, was and is to impose such disproportionately high, discriminatory and excessive charge on the unboxed automobiles of complainant and on vehicles generally; denies that as a practical or economic matter, as respondents, PMA and certain of its members well know, the direct employers of longshore labor handling complainant's automobiles or vehicles generally can absorb such contributions or adopt any other [4] course than to collect such contributions from the carrier or shipper of such vehicles; except as admitted, averred or denied, denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said third paragraph; and

(4) Replying to the fourth paragraph under such heading, admits that the proceedings reflected in Exhibits A through K to the complaint herein took place; denies any and all other allegations.

IV

With respect to the allegations under the heading "Position of Petitioner" complainant:

(1) Denies the allegations of paragraph 1 under such heading; avers that the charges which respondents have assessed against complainant are in fact different than the usual increased charges for higher wages and similar increased costs resulting from collective bargaining between employers and unions in that the usual increased charges referred to are

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

assessed by respondents against customers equally on a man-hour basis; avers that the assessment by PMA for the Fund is made on the basis of weight or measurement and when passed on to complainant by respondents [5] for discharging unboxed automobiles, results in a disproportionately high, discriminatory and excessive charge for such services as compared to the amounts charged to other customers of respondents;

(2) Denies the allegations of paragraphs 2 and 4 under such heading; and

(3) Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 under such heading; avers that such allegations, even if true, do not deprive complainant of its right to present evidence in support of its complaint that the present agreed method of assessments, with its necessary economic effect on rates for handling complainant's vehicles, constitutes an agreement, understanding or arrangement subject to section 15 of the Shipping Act of 1916 and that the resulting rates violate section 16 and section 17 of said Act.

V

While the foregoing reply places in issue the material allegations of PMA's petition, the petition gives such a distorted and inaccurate picture of the issues raised by the complaint that a further reply by complainant is necessary.

[6] Complainant has consistently stated as a matter of record, and reiterates that it does not claim the agreement made between PMA and ILWU, or the Fund provided for by such agreement, is illegal or subject to Commission

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

jurisdiction. To assert as PMA's petition does that the complaint is an attempt to subject this agreement concerning labor relations and collective bargaining to Commission jurisdiction is completely misleading.

The issues raised by the complaint relate exclusively to the method which respondents, PMA and certain members of PMA have adopted to raise the amounts that must be paid to the Fund provided for in PMA's agreement with ILWU. The internal agreements, understandings or arrangements made among the respondents, PMA and certain of its members to raise such amounts are of no concern to ILWU, and have nothing to do with labor relations or collective bargaining. But inasmuch as these internal matters of necessity result in rates and practices with respect to stevedoring and terminal services and facilities, which are discriminatory, unfair, preferential, unreasonably prejudicial or unjust, they are properly within Commission jurisdiction. The assertion by PMA that its verified denial of an agreement or understanding or arrangement renders this issue [7] "moot" at most merely raises an issue of fact on this subject for determination by the Commission on the evidence presented.

PMA insists in its petition that the method by which its employer-members who furnish stevedoring or terminal services and facilities pass on the additional expense of the assessments PMA and its members have established is of no concern to PMA. It seeks in this manner to escape from responsibility for or participation in the establishment of a discriminatory assessment as to complainant's automobiles and vehicles generally. To do so, it must and does ignore the fact that as an economic and practical necessity the assessments it has established must be passed on by its employer-members directly to the carrier or shipper. If the assessment is disproportionately high against cer-

Reply of Complainant to Petition of Pacific Maritime Association to Intervene in Opposition to the Complaint

tain cargoes (in the case of unboxed automobiles increasing the cost of their discharge approximately 22 per cent to 32 per cent as compared to an average increase to other cargo of only approximately 2½ per cent) no employer-member can absorb the increase. Neither can it spread the increase over other cargo handled and still compete with stevedores or terminal operators who handle no vehicles or only a small amount of them. In practical effect, as the respondents, PMA and its employer-members well know, the disproportionately high assessment against unboxed automobiles *must* be passed on to the carrier or shipper if the stevedore or terminal operator is to remain in business. When such a [8] situation is brought about by the majority vote of PMA and its members there exists an agreement, understanding or arrangement within section 15 of the Shipping Act, which fixes or regulates transportation rates unjustly and in a discriminatory and unfair manner. An express written agreement under such circumstances need not exist if the action of PMA and its members, including respondents, presents a "conscious parallelism" among such members from which a concert of action and an understanding must be inferred that, in the absence of exemption as provided for under the Shipping Act of 1916, would contravene the antitrust laws of the United States.

The allegation of the petition that the "method of allocation by PMA to obtain contributions to the Fund including the contributions of respondents here, is in fact not challenged by the Complaint" is simply not true; the very contrary is the case. Equally misleading is the statement in the petition that respondents in their Answer to Libel (Exhibit B to the Complaint) in the litigation before the United States District Court "in effect * * * considered such contributions were valid and were due and owing

by them." The Answer to Libel alleges that the assessments for the Fund are made "on the understanding that the employer can lawfully collect the amount of the assessment from the carrier or cargo owner for whom the employer performs the stevedore and terminal services" (Exhibit B, par. V) [9] and admits that respondents have not paid assessments where the carrier or cargo owner has contended that the assessments are unlawful (Exhibit B, par. IX). These are hardly admissions that the contributions are valid and due and owing; rather they are reservations by respondents of their rights should the contributions be determined to be invalid.

WHEREFORE, complainant prays that after due hearing and investigation complainant be granted the relief sought in the complaint.

Dated at San Francisco, California, this 7th day of March, 1963.

Respectfully submitted,

PETER CURTIS
Peter Curtis

.....
An authorized representative
of Complainant

Attorneys for Complainant:
HERZFELD & RUBIN,
WALTER HERZFELD,
40 Wall Street,
New York 5, New York.

PILLSBURY, MADISON & SUTRO,
S. J. MADDEN,
225 Bush Street,
San Francisco 4, California.

Application for Subpoena Duces Tecum

(Filed April 8, 1963)

[1] BEFORE THE

FEDERAL MARITIME COMMISSION

Docket No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Complainant,

v.

MARINE TERMINALS CORPORATION, and MARINE TERMINALS CORPORATION (OF LOS ANGELES),
Respondents.

To: Benjamin A. Theeman,

Presiding Examiner of the above-entitled proceedings.

Complainant hereby applies for a subpoena duces tecum directing the following persons to produce the following documents at the hearing scheduled in the above proceedings on April 22, 1963, at 10:00 A.M. in Room 11, Federal Office Building, 50 Fulton Street, San Francisco 2, California:

1. Kenneth F. Saysette, Vice President and Treasurer, Pacific Maritime Association, 16 California Street, San Francisco 11, together with all papers, books, documents, records, files and memoranda of Pacific Maritime Association, or of his own, available to him or under his control concerning the method of assessing and collecting funds for the

Application for Subpoena Duces Tecum

so-called "PMA-ILWU Mechanization and Modernization Fund" including, but not limited to:

(a) A true copy of the agreement between PMA and ILWU creating said Fund;

(b) All minutes of PMA directors' meetings, general membership meetings and funding committee meetings since January 1, 1961, at which any action or discussion is or was recorded relative to the said Fund and the method of assessing and collecting assessments to said Fund;

(c) All directives, orders or communications to members relative to the assessment and collection of assessments to said Fund;

(d) All inter-office memoranda and communications concerning the method of assessing and collecting assessments to said Fund.

2. Peter N. Tiege, Vice President and General Counsel, American President Lines, Ltd., 601 California Street, San Francisco 8, together with all papers, books, documents, records, files and memoranda of Pacific Maritime Association, or of his own available to him or under his control concerning the method of assessing and collecting funds for the so-called "PMA-ILWU Mechanization and Modernization Fund" including, but not limited to:

(a) All records, minutes of meetings, reports and recommendations of the special Pacific Maritime Association Committee on Work, Improvement Fund Contributions Procedures and of the so-called PMA Funding Committee;

(b) All inter-committee, inter-office or personal memoranda or communications of the afore-

said Committes with respect to the method of assessing and collecting assessments for said Fund.

Said books, papers, documents and records are relevant and material to the issues herein in that they contain information as to the method adopted by PMA and certain of its members for the collection of the so-called PMA Mechanization Fund assessments, and whether such collection method constitutes an agreement, arrangement or understanding as to how members of PMA, including respondents herein, shall charge to or collect from their respective customers, such assessments, and whether the charges made by members of PMA for discharge of unboxed automobiles are discriminatory or prejudicial to the shippers or importers thereof or constitute unjust or unreasonable regulation or practice.

Dated: San Francisco, California,
April 4, 1963.

HERZFELD & RUBIN,
WALTER HERZFELD,
40 Wall Street,
New York 5, New York,

PILLSBURY, MADISON & SUTRO,
S. J. MADDEN,
225 Bush Street,
San Francisco 4,

By S. J. MADDEN
S. J. Madden

Attorneys for Complainant.

["Certificate of Service" omitted]

Ruling on Application for Subpoena Duces Tecum

(Filed April 12, 1963)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

April 12, 1963

[SAME TITLE]

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[1] Complainant duly applied for subpoena duces tecum in the above proceeding and respondents have stated they have no objection thereto. A reasonable showing having been made, the application is herewith granted.

BENJAMIN A. THEEMAN,
Presiding Examiner.

Excerpts from Testimony

[36] Kenneth Frederick Saysette was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct-examination by Mr. Madden:

Q. Will you state your full name for the record, please. A. Kenneth Frederick Saysette.

Q. What position do you hold? A. Vice-president and treasurer of Pacific Maritime Association.

Q. And how long have you had that position? A. As treasurer, 17 years; vice-president's title [37] about 11.

Q. In your position, do you have custody of records of the company? Are they available to you in the Association? A. I have custody of some, and available to me others.

Q. You received a subpoena to bring with you certain records here which you have worked on with Mr. Torre? A. I did.

* * * *

[50] *Direct-examination (Resumed) By Mr. Madden:*

Q. Mr. Saysette, can you tell us what assessments are made by the PMA under its by-laws, excluding the mech fund assessment? A. The only assessments referred to in the by-laws go to assessments by the Association, which the Association may have to levy for the operation of its own organization.

We have dues and assessments from three or four different sources which are collectable for different purposes of operating the Association. We talk about a seagoing personnel assessment, which is an assessment to operate the Association, a labor function in negotiating contracts with the various seagoing unions.

We have other assessments on the shoreside end of it for dues, which is on a tonnage or a manhour basis, also

used for operating the Association. There is nothing in the by-laws there in any way, shape, or form, which is used or intended to be used for assessments in connection with labor problems.

Q. You mentioned on-shore assessments on a tonnage and manhour basis. Can you explain to whom that assessment applies?

* * *

[51]Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: On the record.

Would you repeat the question, please.

The Witness: Assessments or dues, as they are called, are assessable on a tonnage basis against all steamship and stevedoring companies who report tonnage to the Association and pay such tonnage dues to the Association, based on cargoes handled.

There are also manhour dues paid into the Association by the contracting stevedores, a good portion of that money being used to defray the cost of the longshore dispatch hall in the Pacific Coast which, by contract, we share a joint responsibility with the ILWU.

We have also what you might call payroll dues where the companies using our payroll facilities pay into the Association a percentage of the dollar volume of payroll which we handle for them.

By Mr. Madden:

Q. Are there assessments payable by members to create welfare funds, pension funds, or vacation funds? A. No, these are part of collective bargaining agreements between the unions and the PMA.

Q. And to whom are those payments made? A. The payments are made by the individual employers [52] responsi-

ble for making those payments in accordance with the collective bargaining agreement to the Association, which has acted for many, many years as the collection agency for the fund.

The monies, after they are collected monthly, are turned over to the trustees of the various funds.

Q. On what basis are those assessments made? A. They are made on several different bases. They are made on man hours. They are made on man days of employment on the seagoing side. They are made on man hours on the shore side.

Q. Who constitutes the membership of PMA? A. The membership of PMA consists of American and foreign flag steamship companies operating in and out of Pacific Coast ports, between the Canadian and the Mexican border.

The contracting stevedores also are members of PMA at their own option. They can belong or not belong, as the case may be, and various terminal companies on the Pacific Coast belong.

These various organizations belong for the reason that they have a direct interest in any labor negotiations we may have, particularly the foreign lines and the American lines, and the contracting stevedores with the ILWU and the various types of labor we get through our collective bargaining agreement shoreside.

[53] The American flag operators, those that are operating out of the West Coast, are interested in our collective bargaining process with the various unions who are headquartered on the Pacific Coast.

Q. Those are the seamen's unions? A. That is right.

Q. Under the by-laws, will you describe the method of voting rights granted to members? A. Every company belonging to the Association is entitled to one vote by reason of the fact they are a member. All companies supporting and paying tonnage dues into the Association

for the operation of the Association are entitled to one additional vote for every full 100,000 tons of cargo on which such dues are paid.

On the seagoing side, I would have to refresh my memory, but I believe there is one additional vote that is entitled to employers of seagoing personnel for each additional 100 men employed by those companies, a full 100.

Q. Does this apply to both foreign and American flag? A. The tonnage computation of voting strength applies to foreign lines as well as to American flaglines, and has applied to the contracting stevedores as well. In other words, the contracting stevedores will report and handle cargoes for non-member companies who can't report and pay in directly, but the contracting stevedore does or is [54] obligated under the by-laws to report those tonnages and pay dues into the Association on such non-member companies.

Q. How about the voting for each 100 seagoing men employed? Is that voting right granted foreign steamship companies, too? A. No, because they are not a part of our collective bargaining agreement for seagoing unions on the West Coast.

Q. As between the steamship line companies and the contracting stevedore and terminal companies, who has the majority of the voting power? A. Right as of now, the contracting stevedores I believe have a majority of the voting power.

Q. Would it be possible for you to furnish us perhaps by tomorrow a breakdown of the voting power of the membership?

Mr. Ransom: Mr. Examiner.

Examiner Theeman: Yes.

Mr. Ransom: I should like to have clarified whether he is talking about the shoreside with which

this case is concerned, or if he is also talking about off-shore. There may be a difference.

In other words, this case isn't involved in the seamen.

Examiner Theeman: Can you respond to that, Mr. Madden?

Mr. Madden: I, of course, am interested in the [55] shoreside situation, but that leads to another question.

By Mr. Madden:

Q. In considering the contract negotiations with the labor union that led to the ILWU agreement with PMA, did the steamship companies exercise a voting right in their approval or disapproval? A. Very definitely, because they reported a very substantial amount of tonnage, being members of the Association.

Q. Is their voting right reduced by the number of votes they are entitled to per 100 men in this voting, or do they get their full vote? A. The voting strength is predicated on a full vote, as approved by the directors annually.

Q. So far as the adoption of a contract is concerned, the steamship company would, each one would get his full vote? A. That is correct.

Q. Is the same true in the adoption of a method of assessment for mech fund payments? A. That would be true.

Q. Counting those voting on that basis, who would have the majority control for voting? A. The majority control, as I recall it, was still in the hands of the contractor, even though the seagoing personnel votes were included with the American flag operators.

Q. Then may I repeat the request. Is it possible for [56] you to furnish us a list of the voting members and the number of votes by tomorrow? A. (No response.)

Examiner Theeman: Can you answer the question?

The Witness: We could.

By Mr. Madden:

Q. Don't you have a list that is made periodically from time to time? A. No, this voting strength is made up annually.

Q. Well, perhaps, if it would be much simpler for you, why, it wasn't so long ago then that you must have made it up annually, didn't you? A. That is correct.

Q. Perhaps you can furnish a list of what it was at the end of December 1960 and December 1961, and December 1962, if it is made up already. A. It would be available.

Mr. Madden: May we have—

Mr. Ransom: No objection. If he can make it up, why, we will furnish it.

The Witness: It will be determined on how many additional copies he might have of the voting strength for this last year. I would have to check and see.

Examiner Theeman: Do you think you can have those available by tomorrow, Mr. Saysette?

• • •

[58] Q. Do you know whether the majority of the board of directors are from the steamship lines or not, or do you know? A. The majority of the board is from the steamship lines, American flag and foreign.

• • •

[59] Q. Now, I believe you stated that the majority were representatives of the shipping line interests. Has that been true generally over the past several years, say? A. It has been true as long as I have been with the Association, which is 19 years, and particularly true since our 1949 reorganization as a result of the 1948 waterfront strike when the whole Association was overhauled.

Q. That is when the present Pacific Maritime Association was formed to take over from the old Pacific Coast waterfront? A. Well, it was actually a consolidation of several different associations, and the Waterfront Employers' Association of California, the Waterfront Employers' Association of the Pacific Coast, the Waterfront Employers' Association of Oregon on the Columbia River, the Pacific American Shipowners Association.

Q. How was the funding committee chosen to study this mech fund, do you know? A. The funding committee, if I recall correctly, was selected on a recommendation from Mr. St. Sure. I could be wrong, but I don't think so.

Q. It was not elected, it was appointed? A. It was appointed.

Q. By the board of directors? A. Ratified by the board.

[60] Q. On Exhibit No. 5, there is a letter addressed from Mr. Teige to Mr. St. Sure, dated January 4th, in which they set forth the members of the committee:

Peter N. Teige, American President Lines, Ltd.
Foster Weldon, Matson Navigation Company.
Ian Back, Union Steamship Company of New Zealand.
O. I. M. Porton, Holland-America Line.
Hubert Brown, Pacific Far East Line, Inc.
L. R. Richards, Overseas Shipping Company.

All of these members were associated with the steamship lines, were they not? A. That is correct.

Q. I believe by Exhibit 6, dated January 11, 1961, addressed from the Pacific Maritime Association, to members, that at a membership meeting on Tuesday, January 10, a vote was taken on the method to be used for contributions to the ILWU-PMA modernization and improvement fund.

It calls for a tonnage formula with bulk cargoes at one-fifth the general cargo rate to be adopted with the understanding that the method of collection will receive continued study and be presented to the membership again in six months.

Was that the formal adoption of the basic method of assessment for the fund by the membership? A. No, this was an adoption of a method of assessing [61] without specifically spelling out the rates. The rates were subsequently developed by a committee and, as I recall, taken up by the board of directors around the middle of January.

Q. It was a little bit later than this January 5th date. Did the membership act upon the recommendation of the funding committee again after January 5, 1961? A. This action taken by the membership was with the understanding that the rate would be set by the directors after the funding committee, as I recall it, had come up with some studies and conclusions as to what the rate should be.

* * *

[63] Q. Referring to Exhibit 35, it is provided in paragraph 7 the declaration of tonnage shall be made by member steamship companies and reporting stevedores reporting for non-member companies and for government agencies.

Is that still the method by which reports come to the mechanization and modernization fund? That is, do the

steamship companies report as well as the contracting stevedores? A. Steamship companies report all tonnages. The contracting stevedores, the contracting stevedores make the payments on the mechanization contribution.

Q. When it is a member steamship company and they make it on the basis of a report made by the steamship company? A. Furnished to the contractor.

Q. The steamship company furnishes it to the contractor, does it? A. The figures, yes.

Q. Was that the case from the beginning, or did originally the steamship company— [64] A. It originally started for a two-week period, as evidenced in the file someplace, that the steamship company started making the payment directly.

On advice of counsel, we changed making the payment on account of some internal revenue regulations which says that any benefit along this type of plan, the contribution had to be made by the employer, and not by a second party.

Q. Now, under the plan as adopted, general cargo was to be assessed at 27½ cents per ton, as manifested with 2,000 pounds weight, 40-cubic foot measurement, and 1,000 board feet of lumber, constituting a ton, but then it is provided that the contribution rate on bulk cargo will be 5½ cents per ton.

* * *

Q. Do you know why bulk cargo was assessed at only one-fifth of the rate of general cargo? A. On the basis that generally on bulk cargo there is not nearly the manpower content needed to handle that cargo as compared with cargoes of higher density, such as general cargo.

Q. So the amount of manpower needed to handle bulk cargo was a consideration given in determining the assessment rate? [65] A. On the basis that many more tons could be handled.

Q. Now, has there been any change in any of the methods of assessment under the mech fund plan since its original inception, other than some modifications in rates? A. (No response.)

Kenneth Frederick Saysette—for Complainant—Direct

Q. Has there been any change in any assessment to any particular cargo? A. The only change I can think of, and I can't exactly pinpoint it from memory, as to whether it took place the day we adopted the rate or at our membership meeting before the directors set rates, but formerly under our old reporting procedure scrap iron, for instance, took the general cargo rate and would have taken the full 27½ cents a ton.

The change was made because of the fact that the cargo handling techniques in handling scrap metal had been improved substantially over the last several years before the mechanization plan went into effect, and it was a lot faster handling cargo than it formally had been; and consequently it should be considered in the bulk category class.

Q. This change was adopted at the outset of the plan, or did you say you weren't sure whether it was? A. I think it was adopted at the membership meeting before the directors set a rate for the cargoes.

Q. Now, what about shipments of lumber in the coastwise trade? Was there ever a change made in the method of [66] assessing lumber in the coastwise trade? A. There was not too long ago retroactive to January 16, 1961, on the same basis, namely, that—

> Mr. Ransom: Excuse me, may I ask that the Examiner ask the witness simply to answer the question. He has not been asked the reason. He has merely been asked if there were any change.
>
> The Witness: Thank you, well taken.
>
> The answer is yes.

By Mr. Madden:

Q. And what was that change? A. It was changed from 24½ cents per thousand to, as I recall, five cents per thousand.

Kenneth Frederick Saysette—for Complainant—Direct

Q. Do you know what the basis of that change was, or the basis for making the change? A. Packaged lumber.

Q. You mean previously—

Examiner Theeman: Let the witness explain, Mr. Madden.

The Witness: Previously lumber was loaded board by board. In later years, it is now packaged, and lent itself to simplification of handling.

By Mr. Madden:

Q. Again, then, there was not the necessity for as much labor? [67] A. That is correct.

Q. To go into the handling of lumber? A. That is correct.

Q. In determining the assessment on the basis of tonnage, who decides whether particular cargo is manifested by weight or measurement in a situation where there is no uniform practice? A. (No response.)

Q. Do you know? A. No, this was discussed in committee, but I don't know.

Q. Referring to Exhibits 34 and 35, announcing the mech fund assessment, were there protests immediately to the method of assessment from the Complainant's representative to PMA? A. Yes.

Q. That would be Exhibit 7, a letter from Winchester Agencies to PMA, would it, being the first protest, at least? A. That is one.

Q. Were there protests from any other sources with respect to the assessment on vehicles, by—besides Volkswagen?

Mr. Ransom: What was the word—excuse me—assessment on what?

Mr. Madden: Vehicles.

[68] The Witness: I can't recall of another offhand.

By Mr. Madden:

Q. Did any of the direct employers protest; that is, the contracting stevedores? A. My recollection is that several did.

* * *

[69] Q. Do you recall writing to the members of the Association in January of 1958, stating that a number of steamship companies and contracting stevedores had been reporting automobiles on a weight basis and asking them to correct that situation and report on a measurement basis? [70] A. Yes, I remember that letter.

Q. And if would appear that, at that time at least, some of the members were reporting on a weight basis instead of a measurement basis? A. They were, and we found out, and we asked them to remit retroactively.

* * *

[71] *By Mr. Madden:*

Q. How is the cargo in a container assessed under the mech fund? A. My recollection is that the containerized cargo is assessed on 85 per cent of the cubic contents.

Q. That is on a measurement basis? A. On a measurement basis, as far as I know.

Q. I do not seem to have a copy of this letter, but this is a typed copy of the letter, presumably headed with the Pacific Maritime Association letterhead, with a date of February 3, 1961, addressed to members, and purports to have been sent by you, Mr. Saysette.

It has to do with cargo dues, tonnage, automobiles. Do you recall sending a communication of that nature to members? A. I would like to see a copy of the original letter, if I could. It sounds familiar.

Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: On the record, please.

Mr. Madden: This letter of February 3rd is addressed to members entitled, "Cargo Dues, Tonnage, Automobiles," and it refers to your earlier letter of January 16th that we mentioned a moment ago, in which you stated that automobiles should be reported to the Association on a [72] measurement basis, to tonnage dues purposes.

We indicated that if a steamship company or contracting stevedore was reporting automobiles or any other cargo using weight, when measurement should have been used, a supplementary tonnage report should be submitted promptly to the association adjusting such errors, together with a check to cover the additional amount of dues involved.

Since the institution of the modernization and improvement fund, it has come to our attention a number of contracting stevedores and steamship companies are still reporting automobiles for tonnage dues purposes on a weight basis instead of measurement.

The theory of dues and assessments is predicated on the fact member companies shall pay on exactly the same basis, thereby assuring all companies each is paying a share of dues for assessment programs.

Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form indicating by vessel and date the tonnage on automobiles reported on a weight basis, the tonnage which should have been reported on a measurement basis, and the difference which is as-

sessable at 2½ cents per ton, and it goes on about the check and [73] future reports.

Now, do you recall that there was some such letter?

The Witness: That is right.

By Mr. Madden:

Q. And on whose authority did you write this letter? A. The authority was based on the letter that I sent out in 1958 calling their attention to the fact that it should have been paid on measurement, and was not.

Q. And this again was called to your attention when you were getting the first report in on the mechanization fund assessment? A. Right.

Mr. Ransom: Mr. Examiner, we find that it is in Mr. Teige's file, which they asked for, and which will be produced, so we have no objection if you wish to put that in, or whatever you want to do with it, but it was something that happened to be in another file.

They haven't yet asked for it.

Examiner Theeman: Very good.

Mr. Ransom: So I just wanted to clear the record on that.

Mr. Madden: Again I will have to have some copies made.

Examiner Theeman: Without objection—

Mr. Zimmerman: No objection.

• • •

[75] Q. Is the fund at the present time currently keeping up with its requirements? A. We have done very well. We made our $5 million dollars in the last two years, excluding non-contributors.

Kenneth Frederick Saysette—for Complainant—Cross

Q. When you say excluding non-contributors, do you have sufficient funds, despite their non-contributions? A. No.

Q. Or do you need the contribution? A. No, we need that contribution, to make our commitment.

Q. Would you need the full amount? A. We would.

Q. If all autos were assessed on a weight basis and paid, would the fund be current or not? A. I would say not.

Q. So that if auto assessments were lowered, it would be necessary to raise the assessment on other cargo to meet your funding requirements? A. That is correct.

* * *

[81] *Cross-examination by Mr. Ransom*:

* * *

Q. Mr. Saysette, in connection with Exhibit 6, which I will show you, that exhibit is a report on the membership [82] meeting. You were asked whether the membership at that time approved the assessment that had been introduced or suggested by the committee, and your response was that the amount, the rate hadn't then been determined.

What I wish to ask you is whether, regardless of the computation of the rate, the membership did not at the meeting of January 10th adopt or vote in or improve the method of assessment. A. They improved the method of assessment.

Q. And the rate was merely a matter of computation? A. That is correct.

* * *

Q. In connection with Exhibit 36, which is the letter to members of February 3, 1961, regarding tonnage assessments on membership dues, and a letter in 1958 in which you stated, "This letter of February 3rd is based upon," will you state whether the situation therein described, where it had come to the attention that there were some reporting of

automobiles for the dues purposes on a weight basis, was usual or unusual, at this time? A. In 1958?

[83] Q. First in 1958? A. Reporting on weight basis was unusual.

Q. What was the purpose, then, of sending the letter out? What was the object of it?

Examiner Theeman: Which letter are you referring to now, Mr. Ransom?

By Mr. Ransom:

Q. Well, let's refer to the 1958 letter. A. The purpose was to bring into line, if you wish to call it that, some companies who had been reporting automobiles on a weight basis rather than on a measurement basis.

Q. Now, referring to the Exhibit 36, the letter of February 3, 1961, was there any particular automobile that had precipitated that? A. My recollection was it was the Volkswagen shipload shipments that precipitated this particular problem.

Q. If I understand you, there had been a reporting since you had discovered a Volkswagen on a weight basis rather than a measurement basis? A. That is right.

Q. And you wrote the letter to the membership generally? A. That is right.

Mr. Ransom: That is all.

[84] *Redirect-examination by Mr. Madden*:

Q. Do you recall what company it was that was reporting on a weight basis? A. My recollection the companies were reporting on a weight basis from Marine Terminals, California Stevedore & Ballast Company, and I believe Asso-

ciated Banning down south, Brady-Hamilton in Portland, and I believe Seattle Stevedoring Company in Seattle.

Q. Would your office still have those reports? A. Prior to the mechanization fund, there was no break-out to delineate or define what was automobiles and what were not. We just happened to hear about the fact that automobiles were being reported on a weight basis instead of on a measurement basis.

Q. On February 3rd, when this letter went out, had you received any reports on the mech fund yet? A. Yes, it is possible, but we would have received very few.

Q. Are those reports still in your office? A. Not on the new forms where it can be spelled out.

Q. Then your reports won't show where these contracting stevedores you named reported on a weight basis, or on a measurement basis? A. We don't have the manifest.

[85] Q. If I understand you correctly, then, it was just on the basis of your recollection that it was these particular stevedores that were reporting on a weight basis, the ones that you named? A. We traced it through the office by checking up on a ship and asking the contractor how he reported. He said on weight.

That is wrong, and then from that, why, we pinpointed some other contractors on the Coast who were doing the same thing.

Q. And when was this? A. This was very shortly after the mechanization plan started.

Q. Did any of them claim that they were reporting on other bases, or on the basis of how the vehicles were manifested? A. They did state that they were reimbursed, or they paid the contractor on a unit basis.

Q. And you say you pinpointed the various ones who had been reporting on a weight basis. How did you find out to go back to them and have them correct their assessment if you didn't have any records? A. We assumed that

all companies are honest in their declaration, and if they report so many weight tons and so many measurement tons we take their word for it. We have [86] now instituted a program whereby, as a result, primarily, of this automobile problem having Price-Waterhouse go out and audit 15 companies a year now on a sampling basis to make sure the companies are reporting the way they should.

Q. Did the PMA assess any of these contracting stevedores for past deficient dues? A. No, the letter said, "Please make up the new expense; advise and correct your errors."

And many of them did come through and correct their errors.

Q. They did? A. Yes.

Q. Do you have any record of that? A. I suppose we could dig them out if we had to, but it would be pretty rough going. We have had a lot of paper going through down there.

Q. Perhaps tomorrow you could ask Mr. Lancaster if he could spot where those records might be.

Mr. Ransom: Mr. Examiner, I think we have been awfully cooperative, but I think he is now asking for quite a job, going back three years on membership dues. I think it would be quite a project.

Mr. Madden: We will discontinue further questioning on that.

Examiner Theeman: Are you also withdrawing your [87] demand?

Mr. Madden: Yes, we withdraw our request for a search of the records for this purpose.

Mr. Ransom: Thank you.

Mr. Madden: That is all.

Mr. Ransom: May I ask one question.

Peter N. Teige—for Complainant—Direct

Recross-examination by Mr. Ransom:

Q. The list of stevedore contractors that you recited in answer to Mr. Madden, would you know whether each of those during this period of time were handling Volkswagens or not? A. I am pretty sure they were.

* * *

[88] PETER N. TEIGE was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Madden:

Q. Will you state your full name. A. Peter N. Teige.

Q. And what is your position? A. I am vice-president and general counsel of American President Lines, Ltd., San Francisco.

Q. On what date were you appointed as a member of the so-called funding committee for the PMA mechanization problems? A. I don't remember the exact date, but it was [89] sometime, as I recall it, in November, early November of 1961.

Q. 1960? A. 1960.

Q. Was that when the Committee was formed, or had it existed prior? A. No, that was when it was formed.

Q. And how were you appointed? A. My recollection of that is that we were informed of our appointment by the staff of Pacific Maritime Association, and it is my further recollection that the committee at that time—that is, at what I would refer to as the first Committee—was appointed by the Coast Steering Committee of the Pacific Maritime Association, which is a group of executives of the member companies of PMA who had responsibility for the administration policy of the ILWU coastwide Longshore Agreement. That is the overall basic Longshore Agreement.

Q. And who were the members of the Committee? A. There were six members of the Committee, Mr. Hubert Brown of Pacific Far East Lines, Mr. Foster Weldon of Matson Navigation Company, Mr. Otto Porton of the Holland-American Line, Mr. Ian Back of Union Steamship Company of New Zealand, and Mr. Lloyd Richards of Overseas Shipping Company.

Q. Were any of these members associated with a terminal or a stevedoring member of the Association? [90] A. Yes, Mr. Weldon's organization, Matson Navigation Company, has a wholly-owned subsidiary, as I understand the arrangement, Matson Terminals, Inc., which is I believe both a stevedore and a terminal operator. It is also my understanding that Overseas Shipping acts as a terminal operator. Of that I am not positive.

Q. What was the name of the man from Matson? A. Foster Weldon.

Q. Did Mr. Weldon, when you were on the committee, indicate that he was familiar with the operation and costs which a terminal and stevedore pays? A. (No response.)

Q. Do you know whether he had any experience in that himself? A. Well, Mr. Weldon was the director of Matson's Research Department, and he is a very able man in the department; I understand their work has gone into most every function of the Matson Company. He was not, however, from their Operating Department, and my guess is that he would have a general understanding of their terminal and steamship operation, but might not know specifics as in the case of a man actually working from day to day in that end of the business.

Q. Now, you have brought various records here with you. Is there a convenient way to describe what these are? [91] A. Well, I have a few notes here. These are copies in chronological order of the papers furnished to you by the Pacific Maritime Association, pursuant to your subpoena, less a group of papers consisting of minutes of

the Board of directors of PMA, and the members, and possibly a few other papers.

Mr. Madden: Off the record?

Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: On the record, please.

Let us adjourn until 10:00 a.m. tomorrow morning. All witnesses appearing will please appear at that time.

(Whereupon, at 4:30 o'clock p.m., the hearing in the above-entitled matter was adjourned, to reconvene at 10:00 o'clock a.m., Tuesday, April 23, 1963.)

[92] BEFORE THE FEDERAL MARITIME COMMISSION

Room 11
Federal Office Building
50 Fulton Street
San Francisco 2, California
Tuesday, April 23, 1963

The hearing was reconvened at 10:00 a.m., pursuant to adjournment, Benjamin A. Theeman, Examiner, presiding.

Appearances:

(As heretofore noted.)

* * *

[94] PROCEEDINGS

Examiner Theeman: On the record. The hearing will be in order.

Prior to the opening of the hearing today, Mr. Ransom supplied the attorneys of record and the

Presiding Examiner with copies of the voting strength of the Pacific Maritime Association, as he indicated he would do in yesterday's record.

Without objection, each one of the documents is admitted in evidence. That dated February 9, 1960, as Exhibit 39, that dated March 6, 1961, as Exhibit 40, and that dated March 13, 1962 as Exhibit 41.

(The documents referred to were marked Exhibits 39, 40 and 41, and were received in evidence.)

Examiner Theeman: Mr. Teige has resumed the stand.

Whereupon, PETER N. TIEGE, heretofore called as a witness by and on behalf of the Complainant, being been previously duly sworn, resumed the stand and testified further as follows:

Direct examination by Mr. Madden (Resumed):

Q. Mr. Teige, you stated that the original Committee consisted of six members, whom you named, and I think you [95] designated as the original Committee. Have there been changes in the membership of that Committee? A. In January of 1961, after the initial decision had been taken by the Association with respect to the method of assessment, the Board of Directors asked that a new committee be formed to give further study to the question of the proper method of assessment, and at that time Mr. St. Sure appointed a new committee that consisted of the same six members of the first committee, with myself as chairman, and he added three additional members, Mr. Adams of Pope & Talbot Line, Mr. Rochen of States Steamship Company, and Mr. Littlejohn of Grace Line.

Mr. Littlejohn requested that he not be asked to serve as his duty, he felt, didn't permit sufficient time for the job, and so he did not serve and was not replaced.

That committee, as I recall it, again meeting in late January or early February of 1961—

Q. Is that committee still in existence? A. Yes, it is.

Q. With those same members? A. Yes, although I saw in the paper the other day that Pope & Talbot had gone out of the steamship business, and it may be that we have lost a member by that occurrence, but I am not sure of that. They may still have other activities that would warrant their being members of the Pacific [96] Maritime Association.

Q. Mr. Ransom in explaining the total amount of the fund yesterday said that there was a million and a half dollars collected prior to January 1st, approximately, that was to be turned over to the fund. Do you know on what basis that money was collected? A. I would believe it would be better to ask other witnesses about that, because that was prior to my dealing with this. It is my understanding, however, which you can verify with other witnesses, it was on a manhour basis.

Mr. Ransom: We will stipulate that it was on a manhour basis.

Mr. Madden: That will save some time.

Mr. Ransom: We intend to have Mr. St. Sure here to explain all these things.

By Mr. Madden:

Q. Now, going back to your Committee when it was first formed, I take it you met several times and discussed various ways, problems, and so forth, on how to arrive at a method of assessment in order to raise the required funds. A. That is correct. The committee had, as I recall it, five meetings prior to making its recommendation of January 4, 1961, which was the basis of the action of the membership on January 10, 1961.

Q. During those periods of time did you obtain [97] information or opinions from the outside, or was it pretty much up to the committee to dig up their own information to determine what their recommendations would be? A. The committee had quite a variety of experience in its members. There was a labor relations man, there was a research man, there were several who were traffic men in small organizations where they really get into all facets of the steamship business, including the cost of loading and discharging, method of loading and discharging, and so forth, but then, in addition, these people come from organizations who have men skilled in all phases of the steamship business, and I know in my particular case I spent considerable time with our operating people during this period, and subsequently, too, discussing the various problems that arose in trying to work out a system for the raising of this money.

Q. In your report of January 4th, which has been introduced here as Exhibit 5-A and 5-B, and there was a majority report and a minority report, was there not? A. Yes, there was.

Q. And in the majority report, there was recited various alternatives that weren't considered by the committee. The first, as I understand it, was—well, no. Let me put it this way.

Basically—if I give the report incorrectly, please feel free to correct me, but basically, as I read the [98] report, the committee considered three contentions primarily. Considerations based on manhours, considerations on manifested cargo tonnage, and a combination of manhours and manifested tonnage, and then in addition the report mentioned at least two other suggested plans that, I take it, were not as seriously considered as the first three.

Is that a fair statement? A. Yes, I think that is a fair statement. The other two you refer to were probably given more consideration than the report indicated. These two

were a system that would measure improvements of each, probably operator or some other entity, improvements in productivity that could be traced to this agreement, and charging on the basis of those improvements.

And the other was a proposal that would charge the fund primarily to container operations, as had been done on the East Coast by the ILA, International Longshoremen's Association, in their collective bargaining agreement with the East Coast operators.

Q. Would you briefly tell the Examiner why the committee didn't think either of those were feasible, or if not feasible, practical? A. I am not sure I can do it briefly. In the collective bargaining that has gone on for a number of years, actually, about this subject of work improvement and [99] mechanization, the discussions had dealt to some extent with a question that later the fund committee had to deal with, namely, who should pay what, and the union had been strongly attracted to the idea of measuring the man-hour savings that would come from the agreement they would make about mechanization work improvement and their taking some share of that saving.

At first it wasn't to be a share, but I believe that was the bargaining employed.

My understanding was that at one stage they were talking about taking it all, but realistically they were talking about sharing the savings.

The industry took some steps to look into that possibility, and a gentleman from the Bureau of Labor Statistics, a Mr. Max Kossoris, was engaged to explore the possibility of measuring productivity improvement.

Subsequently, the industry had meetings about this basic question and decided that it was inappropriate to have this kind of system based on a sharing of savings, and felt that instead the only payments that should be made by the industry should be for the harm that came to the labor force

in the way of lost work opportunities from the mechanization and work improvement program.

That decision led to breaking away from the sharing of savings idea in the collective bargaining, and when we [100] considered that system we were strongly influenced by this past history and concern was expressed, particularly by the people close to collective bargaining itself, that it would be unwise for the Association to set up a system that was exactly the system the union had asked for, the fear being that it would be a very simple thing to take that over in the next session of collective bargaining which would come up in five years from the date of this agreement.

Any system that we devised, of course, ran that risk, but the feeling was, as to this one, that it was the very system the union had been strong for, and that we shouldn't play into their hands.

There were other objections to the productivity approach, however. These objections were primarily based on the enormous complexity of such a system. You have a large industry all up and down the Pacific Coast, with a myriad of types and arrangements of activities, and to measure the savings in manhours to all of the elements in that complex system and trace those savings to this agreement was felt to be unworkable or at least extremely difficult to accomplish.

Savings could come from many sources, better supervision, a new, more efficient stevedore, a new terminal, different year on the vessel, changes in commodity mixes that would affect manhour usage, and so on, so that the [101] result would be a very complex system.

So those were the two reasons primarily why we did not pursue that any further. The container suggestion—that is, having some sort of assessment that would throw the entire cost of the fund to containerships or operators using containers—was felt to be patently unfair because there were

many, many other activities in the loading and discharging and terminal processes that were going to have an opportunity at least of being improved under this agreement in addition to this most obvious one of the use of containers.

Q. Then I take it that your committee, in considering these various alternatives, was taking into consideration the fairness of the method adopted and how it would fall upon the members of the Association, and presumably ultimately their customers; would it be fair to say that your committee was considering all those items? A. The committee considered in a general way the question of fairness, but you will have to recognize that it was dealing with literally thousands of possible situations involving stevedores, terminal operators, carriers, shippers, consignees, and involving I suppose literally thousands of commodities, and all of these in various relationships.

So it was not possible, and certainly was not done at the time of the January 4th recommendation that we [102] examine every situation, and the impact of this assessment on all of those situations, but we did give—obviously we were hopeful that we could come up with a system that would not be excessively burdensome to anyone—we had other things, however, to consider, and those were collective bargaining considerations.

I have just mentioned a very serious consideration in connection with the measurement of productivity. We had the problem of working out a system that would be simple in its administration. We have a small organization, a small staff, and we are collecting in one sense a small amount of money.

Q. Now, I take it that we don't have to comment too much on the reasons for rejecting the manhour basis as they appear clearly in your report. That was that you felt that the group that was able to mechanize the most and reduce its labor costs the most, increased the unemployment the

most, would contribute less. A. Yes, I think that is a good statement of it.

Q. Again, though, that would indicate that your committee was thinking, would it not, of the impact of the method of assessment on the particular members who collected it and were faced with the problem of obtaining the money with which to obtain it. A. Yes, Mr. Madden. We were not unaware of the impact [103] of this on the various elements of the industry. However, I should point out that the impact wasn't just a cost. Our problem was much more complicated than that in that the impact of the agreement for which the fund was payment was that it gave an opportunity for savings, and so in considering the total impact of the agreement, and the funds that bought the agreement, you had to take into account in a general way not only cost but opportunities for savings.

So you put those two together in this complex situation, and the close weighing of equities became a real burden to the committee.

Q. The fourth method that was mentioned in the report which was recommended by a minority of the two was a combination tonnage-manhour assessment, and I gather from the report that that is somewhat similar to the way a current assessment for PMA dues is paid.

Am I right or wrong in that? They talk about the 60-40. A. Yes. Yes, there is a distribution of the PMA dues between the funds raised on a revenue tonnage basis and funds raised on a manhour basis. My recollection is that it is 60 per cent manhours and 40 per cent tonnage, but I am not sure of those figures.

Q. I was not clear from reading the report what the reasons were that the majority chose the straight tonnage [104] basis over the combination other than the matter of convenience. I assume there was something more than that, was there not? A. Yes, sir, there was. I think some of the

majority felt that the inclusion of a manhour measurement, even if only a partial measurement, was as to that part unfair for the same reason that the total manhour method of assessment was unfair, namely, that the operator who chucked off manhours as he improved his operation would be paying less and less to the fund, in this case, as to that portion measured by manhours.

Then I think there was a complication, but that—

Q. Then I think there is an arrangement for paying into the mech fund, was there not, for checkers, and— A. Yes, there is. In late 1961, a change in assessment was made that was recommended by the committee which I chaired, and was approved by the board of directors. There had been concern that some of the employers of clerks performing the receiving and delivering process of terminal operations were not paying anything into the fund on behalf of those clerk employees.

Q. And may I interject there, are those clerk employees covered by the ILWU contract? A. Yes. In other words, these efficiencies can be carried out with respect to those terminal activities, as well [105] the longshore activities. In any event, in an effort to correct this problem, it was recognized that some assessment with respect to clerk labor would be made. The committee explored the possibility of doing that on a tonnage basis, too.

Q. That would be increasing the rate slightly? A. No, it would be applying a tonnage charge to terminal operators for every ton handled over a terminal and then, of course, that would reduce the amount that would have to be paid with respect to every ton loaded in and out of a ship, because usually those are the same tons in 99 per cent of the cases.

That idea of charging for clerks on a tonnage basis was dropped when the staff of PMA reported to us that it was or would be exceedingly difficult to get a reporting system

that would accurately state the number of tons that a terminal operator was handling.

And as a result of that administrative problem, it was decided to collect the assessment on clerks on a manhour basis, and the result of that were the following changes in assessment:

The number of registered longshoremen and the number of clerks were compared, and the breakdown, as I recall, came out to 88 per cent longshoremen who were registered and in the industry, and 12 per cent clerks. We then [106] said that 12 per cent of the $5 million per year would be raised by the assessment on clerks, and that fund of money, 12 per cent of $5 million, would be raised on a manhour assessment.

In other words, the number of cents per manhour that would raise that portion of the $5 million, so that was computed on tonnage and manhour figures that we had, and it came out to a new rate of 24½ cents per revenue ton on general cargo.

It had formerly been 27½ cents, and the new assessment of 15 cents per manhour on clerks.

Q. That assessment was only on the hours, the manhours of the clerks themselves, and not the entire work force? A. Just the clerks and checkers, using that term in a general sense, but it is the men in the union who are not handling cargo but are receiving and delivering cargo.

Q. Now, you mentioned something earlier that I would like to emphasize a bit. The ILWU contract covers workers both on the ship and on the dock, does it not? A. Yes. By workers on the ship, I assume you mean longshoremen.

Q. Longshoremen? A. Yes.

Q. And longshoremen on the dock who are handling cargo, as you say, and usually it is the same cargo, so that in [107] determining your measure of assessment you have chosen the contracting stevedore as the person to measure the cargo that came out of the ship, assuming that 99

per cent of it practically is also the cargo that goes across the dock. Is that correct? A. Yes, I think that is right.

Q. But all those employees then, of course, are entitled to the benefits of this mech fund as set up. It is not just the stevedores on the ship that are entitled to it. A. No, it is my understanding that the benefits are available to clerks and checkers, as well as the longshoremen, in the loading and discharging gang, and to the longshoremen who do dock work such as palletization of cargo, restacking of cargo, sorting, and so forth.

Q. Now we come to the final method that was adopted—I mean was recommended by your committee, and subsequently was adopted by the PMA which, in a word, would be on a tonnage basis, weight or measurement, as manifested. Is that correct? A. Well, that isn't quite correct. The recommendation of the committee and the action of the membership was on a revenue ton basis in a manner in which collections were made on a tonnage basis for dues, and there had been over a period of time in the collection of the portion of dues, based on revenue tons, a clearing up of certain uncertainties about [108] per ton types of cargo.

For example, lumber was on a thousand board feet. They had uniformly established 40 cubic feet as a measurement ton, where as in some trades it is not 40 cubic feet. It may be a cubic meter, and so on.

Q. When you say "they," are you talking about the PMA? A. The PMA—I don't know who did it through the years, whether it was the staff with the Board's approval. I assume that would be the case, but in any event there was a system in being, and our recommendation was that that system be expanded to cover these assessments or these charges.

Q. You referred to revenue tons. I take it that revenue tons means the tons on which the steamship companies base their rates, determining how much they should get

for carrying the cargo. A. Well, the expression "revenue tons" means that the tonnage, whether weight or measurement, on which the steamship carrier bases his charge to the shipper. As I just indicated, under this system there were some variations that had been established through the years as to the meaning of a revenue ton for the purposes of collecting dues from the PMA membership, and now collecting this assessment.

Q. In other words, it wasn't necessarily the revenue [109] tons of a steamship company method of manifesting, but the revenue tons as had been built up over a period of years in the PMA— A. Yes.

Q. —that you were talking about? A. Yes.

Q. And you don't have any idea how that came about, except by decisions from time to time, for the purposes of reporting dues? A. I really don't know how that was done.

Q. Did the committee give any consideration to how certain cargo might have been reported, whether by weight or measurement, in various trades? A. Well, the committee understood, I believe, that there were different types of revenue tons in various trades. They understood that that was the case.

Q. Actually, isn't it true that the revenue tons by which a steamship company might determine its rates has very little relationship to the cost of loading or discharging? A. Well, I wouldn't say it has little relationship. It has some relationship to the cost of loading and discharging in that it is a measurement of volume which would suggest that there is something there for somebody to do something about when you load and discharge a ship and, therefore, [110] would lead to an expenditure of man hours in the development of costs.

Q. But in the basic element of containerization, isn't it the fact that the loading and discharging is greatly simplified by the fact that one unit is removed of considerable size or volume as compared to many small items, so that

the size of the particular cargo, so far as loading and discharging is concerned, is not necessarily relevant as it would be to a steamship company which is concerned with space, as well as weight, in its carrying capacity? A. Well, all I can say is what I have said before, that it would be my view that it has some bearing on stevedore activities.

Q. Well, primarily, I gather you are interested in the fact that PMA already had some system of collective bargaining on a weight or measurement basis for their cargo dues when you adopted the same method for the mechanization fund dues.

The Witness: Would you read that question? I missed the beginning of it.

(Record read.)

The Witness: Well, if your question means were we primarily motivated by that fact in choosing this method—

Mr. Madden: Yes.

The Witness: —I would say no, but it was an [111] element and one of the principal jobs that the committee had, it felt, as to the determination of this assessment, was to come up with something that was administratively simple, and easy to operate.

Now, that was not a primary consideration, but it was one of the considerations that this method had the attraction of there being that system in being. That was one of the primary motivations.

By Mr. Madden:

Q. Did you not consider the effect of this method of assessment in any detail as to how it might fall on any particular cargoes? A. I think during the discussion in those meetings from time to time, cargoes may have been

discussed or more likely to be situations being discussed, and given the tremendous number of activities that were affected by this, there weren't very many specific ones.

What we had to do at the outset was come up with a broad general plan, and it was my expectation at least that if, out of this myriad of activity, the transactions that go on in a stevedoring and terminal industry on a whole coast of a country, if in there, in that mass of activity there was something seriously harmed by this assessment, that that would come out, and then we would have to deal with those on their merits, and that is what happened.

[112] Q. There was, was there not, some representation or protest before at least your report was final, by certain scrap metal handlers? A. I don't recall that those interests came to the committee with that problem. They may not have even known who existed—I don't know, but they did make themselves heard to the Association, and that was one instance when the PMA tonnage formula that had been used for the collection of dues was changed.

The scrap had been traditionally for years, apparently, on a general cargo basis, and these people pointed out that, in effect, scrap now was being handled like bulk. It wasn't being carried aboard in swings, but it was being poured in many instances, and in any event was handled very much like a bulk commodity, and my recollection is that the board of directors, as I recall it, without any recommendation from the funding committee, made that change in the tonnage formula at the outset, or very near the outset of the application of the new formula.

Q. Were automobiles discussed at all in any of your meetings prior to your recommendation? A. I don't recall that they were at all. No, I would say they were not, by the first sessions, I mean the sessions that took place prior to the January 4th recommendation.

Q. If a particular commodity, say, in the westbound [113] trade, was manifested on a weight basis and in the

European trade would be manifested on a measurement basis, would you have any opinion as to how it should be reported to PMA? A. I don't think that happens very often. I think usually things are one or the other, but accepting your hypothetical question, it is my understanding that under the PMA tonnage formula it would be as manifested.

In other words, in one case it would be weight, and another measurement. Now, it is also my understanding that that virtually never happens, but I may be in error about that.

Q. Isn't it true that sometimes freight is manifested by weight even though the measurement—that is, the volume—is greater? A. I don't know the answer. That would surprise me, but there are many surprises in the steamship industry.

Q. If this were the case, if there were such cargoes, this obviously would, would it not, affect the assessment that that cargo paid, or I shouldn't say the cargo paid, that would affect the assessment which the discharging stevedore would have to pay on such cargo—that is, he would be paying the assessment on a measurement, on a freight paid basis, although in fact its volume was greater than its weight?

Mr. Ransom: I am sorry, you lost me. I don't know whether you lost the witness or not. Could we have the [114] whole series—

Mr. Madden: Well, perhaps we will start over.

Examiner Theeman: Rephrase that question.

By Mr. Madden:

Q. If there is cargo manifested on a weight basis, although the measurement is greater, would not the stevedore in paying the mech fund assessment be paying on a weight basis rather than a measurement basis? A. Yes,

he would be if, under the PMA tonnage dues procedures, this was the method on which that is collected. I have to say it that way, because there are exceptions that have been established.

Q. I take it your duty in the steamship company does make you familiar with any particular rate as applied to commodies, do they? A. I would say in general, no.

Q. Do you know whether the contents of a container are manifested on a weight basis or on the measurement of the container? A. Well, I know that in the case of American President Lines, which is a typical foreign trade carrier, that its charges for cargo in containers are with respect to the cargo, not a charge based on a per container basis. In other words, if the container contains measurement cargo, it would then be freighted on a measurement ton basis.

[115] Q. And to the contrary, if it contains— A. It would be freighted on a weight basis.

Q. Regardless of the— A. Method in which it is transported.

Q. Do you have any idea, roughly, maybe in a percentage, in automobiles or vehicles, manifested by measurement tons in the steamship trade, in your company? A. I can just give a very general answer to that, that as I understand the trade that our company is engaged in, they are known as measurement trade. They are trades where most of the commodities moving are on a measurement ton basis, but I couldn't tell you the details of the percentage. It would be high.

Q. Marine Terminals, the Respondent here, does work for your company, does it not? A. They do. They are our stevedores in San Francisco.

Q. They perform terminal services for you, also? A. No, American President Lines performs its own terminal services at its main base of operations in San Francisco, which is Pier 50.

Q. You have your own pier? A. We are assigned a pier by the San Francisco Port Authority, and we hire directly the terminal labor mainly for the receiving and delivery of cargo activities.

Q. How about in Los Angeles? [116] A. In Los Angeles we engage a contract stevedore, Associated Banning Company.

Q. That includes Long Beach, also? A. Well, we very infrequently call Long Beach.

Q. I see. A. Our main terminal there is a new one, Consolidated Marine Terminal at San Pedro, and there the terminal work is done by a company called Consolidated Marine, Inc., which is partly owned by American President Lines.

Q. I take it that your committee has received numerous protests from time to time with respect to the way the assessments are charged to the contracting employers on vehicles? A. Yes. We have had protests from, as I recall it, two steamship lines, Wallenius Line and Hanseatic Vaasa Line, and from several stevedore companies, all of whom are stevedores for Volkswagenwerk, and a protest from Winchester Agencies who act in some fashion as agents for Volkswagenwerk in San Francisco, possibly some larger area.

Q. Did you ever receive any complaint from any stevedores who handled vehicles for the Government? A. We had a general questioning of the funding formula by the Army which was passed to us through the stevedores, I believe.

I had forgotten that when I answered your earlier [117] question. The principal thrust of that inquiry had to do with Army containers, but I believe there was a reference to Army vehicles.

However, that was never pursued and never really became, as I recall it, any kind of a burning issue with the

Army or any of their stevedores, and that meant, then, that all unboxed vehicles in the Army were and are assessed on a measurement ton basis.

Q. Has there been any cargo or commodity which moves in volume to the Pacific Coast or from it, other than vehicles, that has been called to your attention, on which the measurement assessment hits the cargo, that has a greater percentage increase as it does vehicles? A. No one has called any such situation to my attention, but I assume there are such situations.

Q. You assume that. On what basis do you assume that? A. That there are cargoes—

Q. I am speaking of cargoes that move in volume, of course. A. I missed that part of your question.

Q. Oh, I am sorry. A. I would say that no such instances have been called to my attention, and I withdraw my assumption.

Examiner Theeman: Mr. Ransom?

Mr. Ransom: I am sorry, but I just didn't hear you, [118] and perhaps you can tell me off the record what that question and answer was about. I just want to know.

Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: We will take a five-minute recess.

(Short recess.)

Examiner Theeman: On the record.

By Mr. Madden:

Q. Now, there were prompt protests from the representatives of Volkswagen or their contracting stevedores, were there not, immediately after the announcement of the assessment? A. There was a very prompt protest from

Winchester Agencies on behalf of Volkswagenwerk, their principal, in the form of a letter dated January 17, 1961.

Q. You are referring, I believe, to Exhibit 7, which was an exhibit received in evidence yesterday. A. That is correct, and I believe at or about that time there was a protest from the Hanseatic Vaasa Line. I do not recall any protest at that time from stevedores, but those came in subsequently later that year, in May.

Q. In May? A. In May of that year.

Q. That was prior to your first six months review of [119] how the assessment was working out? A. Yes. The second committee, so-called, was formed in January of 1961, began meetings, had held a series of meetings, and sent out in May of 1961 a letter to the membership of PMA asking for suggestions as to a new basic method of assessment.

Though it asks for suggestions on a basic method of assessment, it was a natural enough reaction for people who had specific objections to raise them at that time, even though they did not take the form of proposing a new basic method of assessment, and in the letters that came in —and there were not very many—were the letters from the Volkswagen stevedores.

Q. Those letters pointed out, did they not, that the assessment, as imposed, was sufficiently great that it was impossible for a stevedore to absorb the assessment? A. I don't recall if the word "impossible" was used, but certainly it was suggested that they felt it was impractical to expect them to absorb the assessment.

Q. Didn't they actually indicate that the assessment was much greater than any possible profit that they could make out of handling Volkswagens under the present rate?

Mr. Ransom: Mr. Examiner, if he is going to be questioned about these letters, and, "Didn't they

say so-and-so," I think the letters would be the best evidence. [120] He hasn't been bashful about putting in all kinds of exhibits so far. Let's put them in.

Mr. Madden: They aren't exhibits, so far, are they?

Mr. Zimmerman: No.

Mr. Madden: Then I don't object to putting them in.

Mr. Zimmerman: I take it back. They are in.

Mr. Ransom: Excuse me. Then let's refer to them by exhibit numbers.

By Mr. Madden:

Q. Did you first of all receive Exhibit 9, addressed to Mr. Saysette? A. That letter from Mr. Horsman of Marine Terminals Corporation to Mr. Saysette, of March 1, 1961, was subsequently referred to the funding committee. That was not one of the group of letters I was referring to, however.

Q. You were probably referring to Exhibits 16, 17 and 18? A. That is right.

Q. Similar letters, setting forth the facts which they hoped your committee would consider? A. Yes. They, as I recall, in each instance quoted a statement from one of their customers—I assumed it was Volkswagen—that set forth reasons why it was felt that [121] the assessment was unfair to this particular shipper.

* * *

[123] Would that be in line with your understanding of how your company handles containers, that is, the contents are assessed as manifested rather than the volume that they may take up in the container? A. Well, that portion of the brief note is discussing the problem of assessment of Army containers, and I believe the reference

to contents as manifested under the word "recommend" refers to the decision of the committee which, if not taken at this time, was at least reflected as a coming decision that military containers should be charged in the same manner as commercial containers and, as I have indicated earlier, that would be on the basis of the contents as manifested.

Q. There is another entry here of, "Restraintive trade." Do you recall what the discussion was about restraintive trade? A. I think there was a general discussion probably raised by Mr. Lancaster, who is in touch with the PMA counsel, generally, about the activities of the fund. That committee and the PMA should be aware of the dangers of taking any action that would be in restraintive trade in connection with the administration of this fund.

Q. A general discussion? A. A general discussion. It was not a discussion about anybody being in restraintive trade but, rather, making

* * *

[125] * * * as Exhibit 42.

(The document referred to was marked Exhibit No. 42 and was received in evidence.)

Examiner Theeman: Off the record, it was stipulated between counsel that a memorandum of notes of the third meeting held on 2/21/61, in Mr. Lancaster's handwriting, and without objection it is admitted as Exhibit No. 43.

(The document referred to was marked Exhibit No. 43 and was received in evidence.)

Examiner Theeman: Without objection, a memorandum dated February 24, 1961, to committee members from PMA, is admitted in evidence as Exhibit 44.

(The document referred to was marked Exhibit No. 44 and was received in evidence.)

Examiner Theeman: Mr. Madden?

By Mr. Madden:

Q. Mr. Teige, referring to Exhibit 43, on the second page there is an entry reference to autos to be kept on "M.T." basis. And then there are some indications on the side which I take it are votes of the members. Do you recall at that meeting what was discussed about autos and what was [126] decided? A. I remember in a general way that the position that had been asserted on behalf of Volkswagenwerk in the letters I have earlier referred to was considered again and discussed, and a vote was taken to keep the unboxed vehicles on a measurement ton basis, as in the original formula.

Q. Now, referring to Exhibit 44, the meeting of February 24th, Item 4 in those minutes, states, "The mechanization fund assessment for autos should be on a measurement ton basis regardless of how manifested."

Now, was that a new decision of the committee at that time? A. No, my understanding of that, and also the notation in the notes of the minutes of the meeting of February 21st, Exhibit 43, was a reference to the method of assessing for autos that had traditionally been used in the dues assessment.

Q. In other words— A. It was not a new decision but, rather, a reaffirmation of the existing formula.

Q. In other words, while cargoes generally might report—no—cargo generally handled by a stevedore might be reported for dues purposes on the basis of how it was manifested, and it was your understanding that automobiles, regardless of how manifested under the PMA rules from their [127] past practices, were to be reported on a

measurement basis? A. Yes, and that isn't as bad as it sounds, because in most instances autos are on a measurement basis. It is what the steamship people know to be measurement cargo. The problem that had arisen was that some of the conferences I believe were freighting it on a unit basis and, therefore, something specific had to be done in computing the tonnage for the tonnage portion of the dues assessment to charge autos that were freighted on a unit basis.

Examiner Theeman: Would you read back, Mr. Lewis, the whole answer, please, to see that we have the continuity.

Just a moment, please, Mr. Madden.

(Record read.)

Examiner Theeman: Thank you.

Will you continue.

By Mr. Madden:

Q. When you say it was your custom to freight them on a measurement basis, was that the result of any particular study, or was that the conclusion of your committee? A. Well, when I said that, I was talking about my own knowledge of the freighting of automobiles.

Q. And that freighting—

Mr. Ransom: Let him finish.

Mr. Madden: Oh, I am sorry.

[128] The Witness: At the time this subject came up, there was discussion about how automobiles are freighted, and what had PMA been doing about autos in connection with the collection of the tonnage portion of the dues. In other words, it was a new subject to the committee, and the committee in this meeting and prior ones discussed all aspects of the problem.

We discussed the possibility for the benefits that could be achieved by the stevedores or their customers in the handling of autos under the agreement, because obviously that was an important consideration in deciding what someone should pay.

By Mr. Madden:

Q. Before I ask you about that, in your discussion in general of how automobiles were freighted, was there any discussion of how they might have been freighted in full shipload under charter, or was it entirely under what the conference rated? A. No, we understood, as I recall it, that that was the way these autos of the complaining shipper, Volkswagenwerk, were being carried, that they were carried on charter vessels on, as I recall it, a lump sum basis or a vessel charter hire basis, and that stevedoring was being done on a unit basis and that, therefore, there was in effect no freighting in the ordinary berth term sense, but the recognition was that [129] it was measurement cargo normally for freighting purposes and, in fact, the PMA had for a number of years recognized that there was a special problem apparently about the freighting of automobiles and had established a rule about it in connection with the dues collection.

Q. Now, referring to the other things you mentioned, referring to a discussion of possible ways of effecting savings in auto handling, was there any study, other than the opinion of the committee members, with respect to what savings could be effected? A. We did not make, in the case of autos or any of the four or five other committees that became subject to any specific inquiry, at the committee, any detailed study of the changes in the methods of loading and discharging that could result in manhour savings under the work improvement agreement.

We did have a representative in our midst who had made such a study, and we were familiar with an operator that had made savings in the handling of autos as compared with what we understood to be the conventional method of loading and discharging autos, and we did not specifically determine whether those methods were applicable here.

Our feeling in general was, as to the assessment in its broad application, that there were opportunities for savings that we couldn't be specific about, and that this in [130] large measure was what people were paying for.

In some instances the savings could be accomplished. In some instances possibly they could not, but our feeling was that here there was that possibility and, in fact, we were told that there were some steps being taken by the stevedores handling these autos to reduce the number of men they were using, but it was our policy, as I recall it, not to get into the measurement of actual savings or possible savings, as to each commodity.

We had, as I testified earlier, rejected that approach, and so our considerations of possible savings in connection with unboxed autos was just a general thing. It was not a specific study of exactly what the chances were, but we were generally aware that there was an operator who was carrying full loads of automobiles at very substantial reductions in their cost, and under circumstances that would not have in all likelihood been available under the conditions vis-a-vis the union prior to the execution of this work improvement agreement.

Q. And which operator was that? A. Matson Navigation Company.

Q. That is a special vessel that they have for vehicles? A. Yes. I believe it is a regular C-2 or C-3 type vessel, I believe C-3 type vessel, that they did some [131] conversion work on.

I cannot give you all the details of that, except to say that it was a war-built vessel that had been converted.

Q. In the overall formula recommended and adopted, there is a rate of one-fifth for bulk cargo. Now, basically, what vere the committee's thoughts on assessing bulk cargo one-fifth of general cargo? A. Well, this, of course, was a part of the historical traditional tonnage assessment method as had been used for the collection of dues, and there was some discussion about the desirability of keeping that in the formula and, as I recall, there was a view expressed by one member—I forget which one—that that historica exception should not be used here, but that view was not accepted by the committee.

Q. Well, isn't it true that bulk cargo obtains all favorable results of automation, as compared to general cargo or had before this agreement? A. Well, one of the many complications that this committee faced was the fact that there obviously had been changes in the method of stevedoring through the years from the beginning, and it was only because of the pleasures of collective bargaining that the industry was faced suddenly with the demand and insistence that there be some payment made for these changes.

The changes came solely because of the opposition [132] of the union, but there were changes, and the idea of loading a vessel with bulk cargo by essentially gravity methods, essentially, I believe is an old one, and I don't think the industry or the union thought of that as being part of what we were buying here, but that line gets fuzzy as to other commodities, other methods of loading vessels, as to whether they were the sort of things that led to the pressure from the union that finally culminated in this fund, or whether they were something that had been an innovation put into effect long enough prior to this time that the union didn't think it was the sort of thing that had to be paid for.

Certainly the bulk people have had fairly efficient operations, and have had for many years. That is not to say, however, that there weren't new savings that the bulk people couldn't achieve under these conditions. There

were still excessive manpower used in some of the bulk operations, as I understand.

Q. Now, there was one other change, as I understand it, recommended by your committee that I will ask about, and that is the change with respect to the method of assessing for coastwise lumber. A. Yes.

Q. I believe that is Exhibit 2-F, on page 4.

Mr. Ransom: That is already in the record?

Mr. Madden: Yes.

[133] Mr. Herzfeld: Exhibit 2-F, like in Frank.

Mr. Madden: 4 and 5.

By Mr. Madden:

Q. Briefly, what was that change?

Mr. Ransom: I am sorry—excuse me, Mr. Examiner, but I would like to inquire whether he is asking him—what about this coastwise lumber is he asking him, what these minutes said, or which? I don't know.

Are you asking him of his own knowledge about the exception of the coastwise lumber, or are you asking what these minutes say?

Mr. Madden: I am asking of his own knowledge what the changes were with reference to coastwise lumber.

The Witness: Well, as best I recall that situation, there had been for a number of years, apparently, a special penalty payment made by the carriers of coastwise lumber to the longshoremen on a per manhour basis. They had to change their method of operations many years ago, and I believe the change was one, as I understand it, that permitted the crew of the vessels to do some of the work.

In other words, it was a loss of work opportunity for the longshoremen, and I believe a saving to the operators, by using existing personnel on the vessels who are being paid anyway. In any event, although I don't have all the details of that, it was described to us as being a penalty [134] rate of a dollar per straight time hour and a dollar and a half for overtime hours that in some measure at least was paying for an improved efficiency in the handling of lumber, and the feeling was that the 27½ cents per ton in and out that was being charged under this formula for the work improvement fund was a duplication in part of that penalty payment.

Then there was another problem that I think illustrates that we are in the field of labor relations here. The union, the ILWU, had apparently in its agreement with a non-member carrier, or maybe more than one, I am not clear on that point, established a rate for a contribution for the right of that non-member to have the benefits of the work improvement agreement, and that rate was lower than the rate that the PMA was charging its carriers of lumber.

Well, that to me dramatizes the fact that this is a labor relations type problem, and the PMA had to do something about that, so that also contributed to the decision, as I recall it, but it was made up of both those considerations.

Q. Well, doesn't it also dramatize to your mind the fact that in the method that you assess this against your members, you can and sometimes do effect substantially the rates that are charged to the cargo that is being carried? A. Well, I don't understand this was concerned about [135] the cargo. I understand it was concerned about the carriers, in this case.

Q. Well, it meant, did it not, that the carrier would either have to absorb a loss or perhaps lose business to a competing carrier if you didn't reduce the assessment and yet, at the same time, I believe it is the position of your committee that it is no concern how this money is collected.

You have established a method of assessment, and it is up to the member to raise the money from whatever source he can do so. A. I don't think it is a fair characterization to say that we are unconcerned with the ultimate effect of these assessments.

Q. I will concede that. A. And the committee has spent a lot of time considering those effects, and I cannot equate this rather unique coastwise situation to the unboxed vehicle.

Q. Well, of course, Mr. Teige—

Examiner Theeman: Gentlemen, I hope we are not getting argumentative, now.

Mr. Ransom: Well, I think we have been quite argumentative for a long time, but I think my witness can handle himself.

Examiner Theeman: I note that.

* * *

Cross-examination by Mr. Ransom:

* * *

[144] * * * on—I use M&M for mech fund, and I want to make sure that is clear. I don't know which—

Examiner Theeman: We have been using mech fund.

Mr. Ransom: All right.

Peter N. Teige—for Complainant—Cross

By Mr. Ransom:

Q. —for mech fund purposes, on a measurement basis? A. Yes.

Q. Did it vary with the make of the automobile at all? A. No.

Q. Their origin? A. No.

Q. Who the consignee or consignor was? A. No.

Q. And did the committee give any consideration to the possibility of a carrier or stevedore, or anyone, making a change in their traditional method of freighting cargo either from weight to measurement or measurement to weight, in order to avoid or lessen the assessment? A. As a precaution against that, the committee recommended and the Association adopted a rule that the contributions would be based on the tonnage formula as it existed in 1959, which was obviously before we came to a decision about this and, therefore, could not have been affected by the consideration of the impact of the contribution formula.

Q. So that it was the industry pattern prior to the [145] adoption of the plan that it would be used as a base? A. It was the industry pattern in effect in 1959.

Q. And did the committee consider and conclude what the industry pattern was with respect to unboxed automobiles? A. Yes, we were advised that that had been in '59, and before, on a measurement basis, irrespective of the way freighted.

Q. Under the plan, then, as set up, if an individual stevedore carrier or operator of cargo in an FIO situation perhaps makes some contractual arrangements which are not in accordance with the industry pattern, what was the method of determining its assessments? A. Well, we had adopted the industry pattern, and if I understand your question I believe for the great bulk of the organizations and people affected, that pattern worked out, and that was

not to say that there wouldn't be some instances where possibly that industry pattern might not work out.

Examiner Theeman: Would you like to have that question read back to you?

The Witness: I think I understand the question. Maybe I am having trouble—

Mr. Ransom: I am satisfied with the answer.

The Witness: —answering.

Mr. Ransom: Very good.

[146] *By Mr. Ransom:*

Q. After you were appointed the second time, Mr. Teige, and after you had given some consideration to the various proposals, did you issue a bulletin or memorandum to the members asking for ideas from various people? A. Yes. On May 15, 1961, the committee sent to all PMA members a letter which pointed out that the committee was continuing to study the fund and the method of assessment, and that it invited suggestions and proposals from the members on any other basic methods of contribution that might be used.

Mr. Ransom: May we go off the record while I get this document?

Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: On the record.

Without objection, a letter dated May 15, 1961, from PMA to its members, is admitted in evidence as Exhibit 45.

(The document referred to was marked Exhibit No. 45 and was received in evidence.)

Peter N. Teige—for Complainant—Cross

By Mr. Ransom:

Q. Before, Mr. Teige, considering the vastness of this program, did you receive many protests to the position taken by the committee to adopt the tonnage basis for assessment? [147] A. There were two times that protests came to the committee basically. The first was immediately after the initial decision was taken by the membership on January 4, 1961. Considering the thousands of types of transactions that were being affected and the hundreds and hundreds of commodities, many dozens of operators of various types, and in various kinds of operations, the committee thought it was quite remarkable that there were really only half a dozen situations that a vote came in.

The Volkswagen complaint was made by a number of parties, as I have indicated. The scrap metal point which was raised almost immediately and corrected almost immediately, the coastwise lumber problem which we have mentioned, and then there was a complaint by the stevedores handling bananas, and it was their hope that bananas could be treated for assessment purposes as bulk cargo.

They pointed to the fact that the bananas were now typically unloaded on conveyor belts, that they were not packaged or boxed, that they were not marked, and that they had met certain of the requirements at least of all cargo.

That request was rejected by the committee, and that rejection was affirmed by the board of directors, the feeling being that this was a breakbulk type of operation in the first place, and I think there were also some feelings that here certainly was an operation that certainly stood a [148] good opportunity of making a saving under the fund, so from that standpoint, also, there was merit in rejecting the decision, but basically it was an application of the historical industry pattern to that commodity.

Q. Were there any other protests that were considered and rejected? A. I was going to mention two more. The Army had a complaint about both its conex containers and the assessment of autos. I have mentioned the autos.

Q. I don't think you have explained what happened to the autos in the Army. Would you do that? A. Well, they raised the question of whether it was appropriate to assess the autos on a measurement basis, and consistent with the position that the committee took on that issue they were informed that it was, that we were going to treat the Army in the same exact fashion that we treated the commercial operators, and they seemed satisfied with that or, in any event, we heard nothing more about the auto complaint.

The container matter I won't go into here unless someone wants me to, but that was also resolved with the Army, and then there was one other complaint that comes to my mind, and that was a complaint of Isbrandtsen Steamship Company, and I believe also their stevedore, but those stevedore complaints generally just come in along with their [149] customers' complaints.

In any event, it was a complaint raised by Isbrandtsen who were, as I understand it, starting a ten-ton container operation between the Pacific Coast and East Coast of the United States by way of Puerto Rico, and they were planning to load the ten-ton containers with edible rice in bulk, not in bags, for carriage to Puerto Rico.

They argued at some length—we had written presentations, and we had also asked Mr. Krabbenschmidt, I believe—he is their local manager—to appear before the committee so that we could learn more about this and question him about it.

They requested that the bulk rate of five and a half cents be applied to this edible rice. This apparently, on the theory that since it could be carried in bulk at that

rate, that even though they weren't carrying it in bulk, it should nevertheless bear the same rate.

The committee wrestled with that question, as I recall it, at two or three meetings, and finally recommended that this request be denied, and that was affirmed by the board of directors.

My recollection was that the committee felt that if rice is in bags, it is breakbulk cargo and would bear the general cargo rate, and putting it in a bigger container, in this case a ten-ton container, still made it breakbulk cargo.

[150] Now, it wasn't, unless they were prepared, and in a position to have it shipped as bulk cargo, that they would bear the bulk rate.

That decision I don't believe was too happily received by the applicant, but we did give it our fullest consideration, and the entire committee voted against their position and, as I say, it was affirmed by the board of directors.

I think those are all of the complaints that have been registered against the plan, and now our committee is still in being and available for further complaint, but now more than two years later these have been the complaints we have received.

Q. You indicated in your examination by Mr. Madden, and as indicated by Exhibit 44, that sometime in February there was consideration of the committee on the question of automobiles, as to whether they should be on a measurement basis or what they should be on, and turned down.

Did your committee at a later date receive any requests from Volkswagen or its stevedores for a reconsideration? A. There was such a request, and in November of 1961 it was arranged for the Volkswagenwerk people to appear before the fund committee. That meeting was arranged, as I recall it, either at the request of, or at least in friendly [151] arrangement with Mr. Peter Curtis of Winchester Agencies, Inc.

Q. That is the gentleman sitting over there? A. Yes, and he had advised that on November 24th a Mr. Klaffs of the Volkswagenwerk in Germany was to be in town and available for this meeting.

Q. As I recall, it was the day after Thanksgiving. A. It was November 24, 1961.

Q. And will you tell us generally what took place at that meeting and what was discussed? A. My recollection is that our committee was well attended. Mr. Curtis was there, Mr. Klaffs of Volkswagenwerk, Mr. Calhoun who was then their attorney in this matter, and I believe there were representatives of some of the stevedores on the Pacific Coast who handle the Volkswagenwerk. It was an extended meeting, and my recollection is that Mr. Klaffs himself presented their position and presented it very well.

And there was a general discussion of the problem. It is my recollection that Mr. Klaffs' concern—I hesitate to say his major concern, but a concern which is the one I best remember him discussing was as—was that this assessment would embarrass Volkswagen in their competitive fight with other compact cars.

He told us that this was a very competitive market, and that they were concerned about their competitive position [152] as a result of this assessment.

Q. Did he indicate any figures along that line? A. Well, the assessment, as I recall it, is something over $2.00 per auto.

Q. And Mr. Klaffs thought that $2.00 would have some effect on the competitive sales of their automobiles. Is that what you are saying? A. My recollection is that he said it would have, and obviously would to some degree; the question would be the degree.

Q. Well, now, did the committee make a decision at that time and advise Mr. Klaffs of what its decision was, or did the committee subsequently meet? A. The com-

mittee, according to my records, met on November 29th, on December 8th, on December 12th. I believe that this subject was discussed to some degree at all or some of these meetings, and it was decided to reject the protest.

I believe again this was the unanimous feeling of the committee, and on November 14th the board of directors had before them again this subject of the unboxed auto assessment, and they again approved the existing program.

* * *

[156] Q. Mr. Teige, frequently in this hearing there has been the expression "berth term" or "berth operators." Under what is called berth terms, who hires and pays the stevedores? A. The carrier.

Q. When cargo is shipped on an FIO basis, what does that mean? And who hires and who pays the stevedores? A. When cargo is shipped FIO, that is free in and out, the loading and discharging costs are borne by cargo rather than the carrier, and the ocean freight rate is solely for carriage.

Q. Can you state whether the preponderance of general cargo in and out of the Pacific Coast is on berth terms, or on FIO basis? A. The preponderance—talking about revenue tons—is I believe on a berth term basis. In 1959, the Pacific Coast, through the use of ILWU labor, handled in the neighborhood of 25 million, over 25 million tons, of which 17 million were general cargo and eight million bulk cargo. The bulk cargo would be most frequently on a basis where the shipper would pay for the loading, although not always. The general cargo would in most instances be on a berth term basis, though not always.

Q. Automobiles are general cargo, are they not? [157] A. Automobiles are general cargo and, of course, I said in most cases, and here we have an instance where there is an exception to that, where you have a cargo that is or

has been commonly berth term cargo carried on an FIO basis.

Q. You are referring to the Volkswagen? A. The Volkswagen.

Q. FIO arrangement? A. Yes.

* * *

Q. Is it your understanding that Volkswagen is shipped primarily on an FIO arrangement? A. Yes, that is my understanding that the shipper, Volkswagenwerk, directly engages the services of the stevedore, at least at this end, for the discharge of the automobiles.

* * *

[158] Mr. Madden: It is stipulated that for the past five years the preponderance of Volkswagens which have been brought to the Pacific Coast have been brought in under charters, or on the contractual FIO arrangements.

* * *

[161] Mr. Teige, have you made a review and can you state whether, following the M&M fund plan in the conferences that you belong to that affect the West Coast longshore labor, that are concerned with West Coast longshore labor, increased their rates to reflect the M&M or the mech fund assessment to the extent those assessments were passed on by stevedoring companies? A. I believe I am safe in saying that no conference that I am familiar with on the Pacific that had a terminus on the Pacific Coast—that would be both outward and inward conference—made any freight rate changes based on this assessment, the problem being that these rates are determined by competition in the sense that there are frequently carriers who operate outside of these conferences; and that has been particularly true in recent years with the overtonnaging of world shipping, and the result has been that many of these conferences have been reducing rates rather than increasing rates.

But I know of no conference that increased its rates because of this assessment. That is not to say that they wouldn't like to or that they won't some day do that, because obviously, in the end, if they are going to stay in business, the carriers have to pass on all of their costs from whatever source, and a little more for a profit.

Q. Mr. Teige, if the M&M plan is successful, there [162] would be no need to pass on M&M fund assessments to the extent the carriers got it, would there, because you would presumably have some advantages. A. That is a good point. I should have talked in terms of any net cost, and I think you can get a lot of argument in the industry as to what the savings have been that have flowed from this agreement.

There are many that you can actually put your finger on, but it would be difficult overall to say where the balance sheet is now between the outflow for contributions and the inflow for savings, but that is very true, that the net cost may be, industrywide negligible, but that is industrywide and not on an individual basis.

Q. From your knowledge of the plan and its operation, both as an operator and a committee member, was there any agreement among the PMA members or between the members, or with PMA and the Association, that the contributions paid by the direct employers would in turn be paid to them by their customers? A. No such agreement whatsoever.

Q. In APL's case, what happened to your stevedoring arrangement after the M&M fund went into being? A. Very shortly after the assessment began and the work improvement agreement went into effect, and you could start making efforts to achieve savings under the agreement, [163] we put our San Francisco stevedore on a cost-plus basis, as an emergency measure, to assure that any savings that came from his change of operations would accrue to us immediately.

Prior to that, our rates were on a commodity rate basis, and unless those rates had been all renegotiated, why, we would have gotten no benefit from the saving. That arrangement, as I say, was an interim one, and since that time these rates have been put back on a commodity basis which would, as is usually the case, reflect the negotiations between the stevedore and the carrier, as to the appropriate charge for loading and discharging of those commodities, taking into account the expense of that work.

Q. In the cost-plus arrangement, would the cost-plus—would the cost include a listing of such things as welfare plan, PMA dues, pension plan, and possibly the M&M fund? A. Yes, it would include all of the labor costs, and I would include the M&M assessment as a labor cost, all of the labor costs of the stevedore.

Q. Was there any agreement among PMA members, or with PMA, that if the stevedore company's assessment was passed on to the carrier, that the carrier in turn would pass the amount on to their customers? A. No, of course not.

Q. If the stevedore could choose all or a part of the M&M fund, would he be in breach of any arrangement or [164] understanding? A. None whatsoever. He would be perfectly free to do that if he was able to do it, or for business reasons thought that desirable.

Q. If the stevedore could or did not make its contributions as assessed to the M&M fund, would he be in any violation of any agreement with the union? A. Yes, the stevedore, as an employer, has in each case executed or had executed for him on his behalf an agreement with the ILWU that includes a provision that the contributions to the mechanization fund must be paid on the basis determined by the Association, so it has an obligation in the collective bargaining agreement.

Peter N. Teige—for Complainant—Cross

Q. Mr. Teige, you spoke of these conferences as rate-making conferences. Do you put the Pacific Maritime Association in that category? A. Certainly not.

Q. Suppose that the Federal Maritime Commission for some reason, which I can't conceive of, were to hold the assessment against Volkswagen as somehow or other illegal, what effect do you think that might have on the plan? A. Well, one can speculate about that, that the basis of their complaint has to do with the relationship of the labor cost, as related to the assessment. There is a whole spectrum of relationships of that kind in the industry, [165] involving not only every commodity which has a different relationship of labor needed to move it, as compared with the assessment, but different between each operator, because one operates one way, and one another, and one more efficiently and one less efficiently, and so on.

So there would be a vast inquiry, if everybody were to come either to the PMA or to hopefully the FMC, so that we wouldn't have to deal with them to litigate about exactly where each operator, as to each commodity, would fit into that spectrum.

There would just be a part of the picture, because it doesn't seem to me you can leave out the question of the benefits that potentially, at least, might be available to each operator, and if that is thrown into the picture then it further compounds the matter, and I honestly believe, after having spent many, many hours and days on this perplexing subject, that that would create a very serious situation for whoever it was that had to wrestle with the decisions that would flow from that turn of events.

Mr. Ransom: That is all.

Redirect examination by Mr. Madden:

Q. Mr. Teige, you mentioned I believe that autos are a measurement type cargo. You were speaking about that from the standpoint of a steamship company operator, were you [166] not, at least for rate-making purposes? A. Yes, there isn't any other basis that I know in which to use that expression.

Q. Measurement tons normally are not any basis for a stevedore to fix his rates, are they? Do you know, or are you able to speak on that subject? A. Well, I know generally about the stevedore business. My understanding is that many stevedores charge for their services on a revenue ton basis, and, therefore, if a certain cargo is on a measurement ton then he will have so much a ton, based on a measurement ton.

If it is a weight ton, he will have a charge of so much a ton, based on a weight ton.

Q. But basically isn't it the time it takes to handle a particular cargo that controls the stevedore's rates? A. Well, there is no question about it, that in deciding how much to charge per ton, whatever basis it is on, the stevedore looks to his cost, and his cost would be made up of all the things that a stevedore's costs are made up of, primarily labor, because he is basically a labor contractor.

Q. If he makes it up on his cost, then he may convert those costs against cargo on a measurement ton or on a weight ton basis, either way that he sees fit. Is that what you mean when you say that he could use either term? A. I think that he could charge for his services on [167] any basis that he works out with his customer, and there are many, many ways it is done. The most common way I have always assumed was on a commodity rate basis.

Q. But taking the example that Mr. Ransom gave you, if he were handling lead and he knew how many hours it took to handle the lead, he could readily enough, I assume,

convert those hours into a rate on a measurement basis, could he not, if that would net him the same amount of money as if it were a weight basis? A. I see no reason why either a stevedore rate or a freight rate can't be put on either basis. It just changes the amount.

Q. And as in the case that we are talking about in this proceeding, there is no reason why he can't be on a unit basis if the unit is an appropriate measure of converting the hours into compensatory rate? A. Well, by no reason, you mean that that is a logical—

Q. That is right. A. —and a conceivable way of doing it?

Q. Yes. A. That is right, I think stevedores do charge on a unit basis for cargo like automobiles.

Q. And you mentioned also about the industry pattern in 1959, as manifesting autos on a measurement basis. Are [168] you familiar with an industry pattern, as such, or were you referring to the pattern that the PMA had adopted as its pattern for its assessment of dues? A. When I used the expression industry pattern, I was talking about the PMA method of assessment for its dues, the tonnage portion of its dues assessment.

Q. Now, in the original adoption of the assessment plan, it was specifically provided that your committee would review the effect of the assessment within six months, and periodically I assume thereafter, and you testified that you had sent out this notice asking for suggestions as to the —I suppose I ought to refer to the letter, Exhibit 45—you requested as an aid to your work that any PMA member who has a proposal to make for a new or improved method of assessment for the support of this fund should set forth their views in writing to the committtee as promptly as possible for its consideration of such a proposal.

Do I take it that the committee was only to consider new overall methods of assessments, or did you feel that it was your duty to consider whether certain exceptions

might be appropriate to the method that you had already adopted? A. Well, I think that we felt we had both responsibilities. The fact that we, on the one hand, did discuss the whole problem as a general thing, including a consideration of a plan suggested by the Matson Navigation Company, [169] the details of which escape me now, but it was a general plan, and also at the same time during this same period, we went through the procedure with Volkswagenwerk on their specific request for an exception to the present formula, and it was during this period that we considered that problem that had culminated in the meeting of November 24th.

Q. Well, that was the question that I really wanted to bring out. I think you have answered it. Your committee would, if they felt it was appropirate, recommend an exception if they felt it was inequitable, an exception rather than an adoption of an entirely new program? A. Our committee—

Q. In other words, to put it specifically, would you have considered it within, would you say, duties— A. Scope.

Q. Scope of your committee, if you thought that the vehicles should be assessed on, for example, a unit basis, that it would be appropriate for you to recommend such an exception to the Board, or would you consider that beyond the scope, that it would have to be an entirely new method of assessment that applied to all cargo? A. No, we considered it part of our job to re-examine what we had already done on any specific details, and again I give as the prize example of that the Volkswagen situation where we held a number of meetings and spent a good deal of [170] time going over that problem, and finally had to vote and resubmit our vote to the board, so that that got full consideration both by the committee and by the board of directors.

Q. And the other prize example of the coastwise lumber that you felt was entitled to relief— A. Yes.

Q. I believe you mentioned that your committee was surprised, perhaps just pleasantly surprised, that there weren't more suggestions or complaints at the end of six months from more types of cargo; that was your statement, wasn't it? A. Yes, and to—

Q. Well, I didn't mean for you to elaborate on it. I didn't want to misquote you.

Did you think perhaps that this might have been because your method of application had only ended in assessment that hit just these particularly few complainers, or did you think the rest were just silent? A. I can only speculate about that. It is my personal view that there was a general recognition of the complexity of the job that had been given the committee, and that it had in good faith and conscientiously tried to reach a plan that we could live with, and that it had done that in the main, and that people recognized that it had [171] done that.

Q. Well, for the record, I would like to say, Mr. Teige, that I wouldn't for the world question that you were doing the very best you could. A. You are just wondering if that best was good enough.

(Laughter.)

Q. No, we just disagree with it.

If the facts were that there were only a few complaints, not only at this time, six months later, but apparently very limited for over two years that the plan is in effect, how does that jibe with your concern that if relief were granted in one particular case, that would open up a whole spectrum of complaint from cargoes that you had never even heard from? A. Well, I say that because it seems to me that the basis on which relief is being requested here is such that once that section were established in that one case, then there would be a multitude of people who will say, "Me, too, if that is the game going to be played I want to get

in that game, and I will make the same sort of complaint. I didn't get anything out of this fund." Or, "I am paying more than the next fellow, and I do it this way, and he does it that way," and so forth.

I think people who have had those feelings have [172] restrained themselves in the interest of an overall workable program that they consider worth while, but I am not sure they would if they saw relief granted on that principle.

Q. You stated that to the best of your knowledge the carriers who operated on berth terms had absorbed all increases, if any, that might have resulted from the mech fund assessment on their contracting stevedores, is that correct? A. At least at the time that happens. Now, there have been in recent months a few conferences that have been able to raise their rates, and then you begin to be unable to say that because obviously, when there is a general five per cent increase of rates, it is to cover the rates that the carriers are concerned about, and this might be one of them from the standpoint of cost.

Q. If an FIO non-member's assessment, or the assessments on his contracting stevedore was reduced, that would necessarily tend to increase the ultimate cost that the member carrier might have to bear in the long run. Wouldn't you say that was a correct conclusion? A. I wonder if you would read that question to me.

(Record read.)

The Witness: Any reduction of anyone's assessment will increase everybody else's—

[173] *By Mr. Madden:*

Q. I will accept that. A. —for the reason that this is a lump sum that has to be raised.

* * *

Mr. Ransom: I think there might be some possible confusion as to what was meant by everybody else's, and I would like to ask him to explain what he meant by everybody else's.

Recross-examination

The Witness: Well, what I meant to say was that if any PMA member's contribution is reduced, it increases the contribution of all other PMA members. I did not mean to suggest that any non-member of PMA who is not participating in this program and fund would be involved in that contribution.

And when I say a member's contribution, that, of course, could be a contribution made by a member stevedore with respect to work performed for a non-member carrier or a [174] non-member shipper, if it were an FIO arrangement.

* * *

[176] Whereupon, FRED R. SMITH was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Madden:

Q. Would you state your full name, Mr. Smith. A. Fred R. Smith.

Q. And what is your occupation? A. I am president and general manager of Seattle Stevedoring Company.

Q. And that is in Seattle? A. Washington.

Q. Are you an officer or a member of the board of PMA, Pacific Maritime Association? A. Yes, sir, I am a member of the board of directors of the Pacific Maritime Association.

[177] Q. I take it that you are a representative of the group designated as a stevedoring group? A. Yes, sir.

* * *

[178] Q. Do you discharge Volkswagens in the Seattle area? A. Yes, sir.

Q. And who employs you? A. In this particular case, the Volkswagen company.

Q. Do you discharge Volkswagens for anybody else? A. Oh, yes.

Q. Who else? A. Hanseatic Vaasa Line, and some other lines, and other berth liners that haul Volkswagens, of which these contracts are direct with the steamship company.

Q. Upon the adoption by the Pacific Maritime Association of the method of assessment for the mech fund, did you ever protest to the PMA as to the impact of that assessment on Volkswagens? A. Yes, we did. It is a matter of record with the PMA.

Q. Did you advise PMA directors that it was impossible for you to pay that assessment with the rates that you obtained for discharging Volkswagens? A. I believe our letter indicated with rates that we [179] then had, we could not absorb assessments as set out by the funding committee.

* * *

Q. Without being specific, about how much approximately did the mech fund assessment, if added to your rate, increase the total amount of that rate? A. It varied from 20 to 50 per cent, I would say. Again, that is only from observation, and not from an accounting standpoint, just general.

* * *

Fred R. Smith—for Complainant—Cross

[180] *By Mr. Madden:*

Q. Is there any cargo which you discharge, the cost of which is increased in as great a percentage as the cost is increased for Volkswagens by reason of the mech fund assessment? A. No, sir, there is no commodity with that percentage [181] of increase.

Q. Have you any idea about what type of cargo would be the closest percentage? A. Again, in round figures, I would say from four to ten per cent.

* * *

[183] Q. How does the volume of all automobiles that you handle in your port compare to the number of Volkswagens that you handle? A. I would say Volkswagens were approximately 75 per cent of all the foreign cars delivered in our area.

Q. Since the mechanization program went into effect, have you been able to reduce in any way your expenses for discharging Volkswagens by reason of the latitude given waterfront employers under that agreement? A. No, sir.

Q. Have you been able to plan or do you anticipate that you will be able to develop any such improvement in the foreseeable future under the latitude granted you? A. Not to my knowledge. I cannot see at this time such an arrangement.

* * *

Cross-examination by Mr. Ransom:

[192] Q. In handling Volkswagens in connection with common carriers on berth terms, have you made the assessments into this fund? A. Into the PMA fund?

Q. Yes. A. We have paid it into PMA for the fund. I assume they fund it in there, yes, sir.

* * *

Q. Have you paid into the fund, paid into the PMA for the fund assessments in connection with your FIO arrangements with Volkswagenwerk? [193] A. No, sir.

Ellet G. Horsman—for Complainant—Direct

Q. Are those the only assessments which are outstanding as far as your company is concerned? A. We have a 90-day time of collection of the payment to PMA and, to my knowledge, we are current.

Q. Except for in connection with Volkswagens? A. Right.

Q. Is your contract with Volkswagenwerk as a cargo owner or as a carrier? A. We have a contract with Volkswagen to discharge automobiles for so many dollars per unit, whether they be a contract cargo carrier, a charter or owner, or anything else. We don't go into that. We have a contract to discharge so many for so much per unit.

Q. Could you give us the exact name of the company with whom you have that contract?

I am sure you will have to spell it. A. Volkswagen, V-o-l-k-s-w-a-g-e-n-w-e-r-k, A. G.

* * *

[202] Whereupon, ELLET G. HORSMAN was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Madden:

Q. For the record, will you state your full name. A. Ellet G. Horsman.

Q. And your position? A. Vice-president, Marine Terminals Corporation; vice-president, Marine Terminals Corporation of Los Angeles.

Q. Those are two separate corporations, are they? A. Yes, sir.

Q. Are they affiliated in any way? A. Same directors, same stockholders.

Q. What businesses are those two corporations engaged in? A. Contracting stevedores and ocean terminal operators.

Examiner Theeman: And what kind of terminal operators?

The Witness: Ocean.

[203] *By Mr. Madden:*

Q. And who do you perform this work for in general? A. Both common carriers and contract carriers, and all forms of marine transportation, both by vessel or barge.

Q. Do you discharge Volkswagens? A. Yes.

Q. In San Francisco and Los Angeles? A. San Francisco and Long Beach, yes, sir.

Q. Long Beach? A. Yes, sir.

Q. The ones in San Francisco are discharged by Marine Terminals Corporation? A. Yes, sir.

Q. And the ones in Long Beach by Marine Terminals Corporation of Los Angeles? A. Los Angeles.

Q. How long have you been discharging the Volkswagens? A. The first vessel was in 1954 in San Francisco at Pier 39. The name of the vessel was the VAASA LAVIA.

Q. Was that vessel on the Hansiatic Line? A. No, she was then owned by the Lavia-oy. She was serving independent from any line. I believe that was before the formation of the Hansiatic Vaasa Line.

Q. Since then, have you discharged Volkswagens for common carriers? [204] A. Yes, sir.

Q. Both in San Francisco and Los Angeles? A. Yes, sir.

Q. And also for chartered vessels? A. Yes, sir.

Q. Now, in the case of common carrier vehicles, who contracts with you for your services? A. The owner, through his agent or representative.

Q. You mean the owner of the vessel? A. The owner of the vessel, yes, sir.

Q. In the case of chartered vessels, whom do you contract? A. On Volkswagens?

Q. On Volkswagens. A. In the case of Volkswagenswerk, we deal directly with the factory, with Wolfsburg, Germany, and our contractual arrangement is a stevedore work order on a ship to ship basis, assigning us the performance work.

* * *

[205] Q. When you referred to work order, Mr. Horsman, is this the type of work order you received from Wolfsburg on chartered vessels? A. Yes, sir.

Mr. Madden: I offer this in evidence as Exhibit 51.

Examiner Madden: Without objection, the work order referred to is admitted in evidence as Exhibit 51.

(The document referred to was marked Exhibit No. 51 and was received in evidence.)

By Mr. Madden:

Q. According to the work order, Mr. Horsman, there are some—strike that—there appears in the left lower portion of the order a provision that says that all work services to be rendered for an eight-hour day only, at the commodity rate of blank dollars per vehicle to place of rest on dock, i.e., including handling; and above that there are listed three different types of vehicles, 707 sedans and convertibles, 75 transporters, 18 Ghias. Was the rate per vehicle the same for all those types of vehicles? A. Yes, the rates are the same regardless of what type of vehicle it is, as far as Volkswagens go.

* * *

[213] Q. In Exhibit 7, which is the letter from Winchester Agencies to Pacific Maritime Association, dated January 17, '61, at the top of page 2 it is stated that—

Mr. Zimmerman: Pardon me, what was the exhibit number?

Examiner Theeman: 7.

Mr. Madden: 7.

By Mr. Madden:

Q. It is stated that the current—that would be the [214] January '61—discharged cost of a shipment, assuming approximately 50 per cent Volkswagens and 50 per cent transporters, would be about $10.45 per auto. Is that approximately your— A. Yes, sir.

Q. —recollection of that charge at that time? A. Yes, sir.

Examiner Theeman: Let him finish the question, please, Mr. Horsman.

By Mr. Madden:

Q. Is the present average cost of discharge per auto —does it vary more than, say, 40 cents from this cost?

Mr. Ransom: Mr. Examiner, may I ask that we define what he is talking about? Is he talking about the cost of the Volkswagen; in other words, the commodity price; or is he talking about the cost which Marine Terminals undertakes, to which they would add the cost?

By Mr. Madden:

Q. Is that the average commodity price which you charge Volkswagen?

Examiner Theeman: Your question refers to Exhibit No. 7?

Mr. Madden: Yes.

Mr. Zimmerman: Now, I would like to interpose an objection to any further questioning along this line. As I [215] understand, the purpose of this testimony was simply to establish that it was necessary for Marine Terminals to reflect these assessments in its commodity rate, so that ultimately they would be paid by Volkswagen.

I don't believe that there is any question that that is so.

Mr. Horsman has testified that these costs must be reflected because they operate on a cost-plus basis. Now, what the actual amounts are I believe is irrelevant. The costs and commodity rates in the stevedoring industry are highly confidential.

Unless there is some compelling reason for getting those figures on the record, I would object to any further questions along this line.

Mr. Madden: Well, one of the fundamental complaints set forth in this proceeding on the part of Volkswagen is the percentage increase in the cost of discharging Volkswagens, which inevitably results from the imposition of this assessment charge on top of the pre-existing charges, and if we don't have the pre-existing charges there is no real basis for us to show what the percentage of increase is in this proceeding.

Mr. Zimmerman: You have on the record a statement of what the costs were at the beginning of the mechanization fund. In the absence of any evidence to the contrary, that [216] gives you your percentage. I don't know as it is necessary to go into details of later costs.

Mr. Madden: That solves one thing.

Now, another element of proof of Volkswagen is that there have not been effected any material savings in the handling of Volkswagens since the introduction of these mechanization systems, and if we cannot show whether the rates are approximately the same now as they were before, or the variations in the rates, we have at least one source of such proof barred from us.

Mr. Zimmerman: We have no objection to questions as to whether they have been able to effect any savings.

Examiner Theeman: It would seem to me, gentlemen, that at the moment, insofar as any testimony to be adduced deals with the figures already in the record, you therefore should have no objection to them.

Mr. Zimmerman: The figures already in the record?

Examiner Theeman: That is right.

Mr. Zimmerman: He has asked an additional question about current costs.

Examiner Theeman: I haven't heard any questions yet dealing with current costs.

Mr. Madden: I was leading up to one, Mr. Examiner, when this discussion started.

Examiner Theeman: You were leading to it, but I [217] hadn't heard it yet.

Mr. Zimmerman: Well, it was my understanding that he had asked the question about current costs, and that was the question to which I directed my objection.

Mr. Ransom: It was at that point that I asked about current costs, and he said he meant commodity rates.

Mr. Madden: That is true.

Mr. Zimmerman: I have no objection to Mr. Madden questioning Mr. Horsman about any rate to be assessed under the mechanization fund.

Mr. Madden: Basically, this is a question of an alleged confidential matter with rates as it applies to these particular sets of circumstances, but I can't see how this confidentiality enters into the testimony that is given at this hearing on what the rates charged for the discharge of Volkswagens by the Respondents are, and what they would be with the imposition of the cost of the assessment.

Examiner Theeman: Let's go off the record.

(Discussion off the record.)

Examiner Theeman: Let's go on the record, please.

By Mr. Madden:

Q. Since January of 1961, have there been any substantial increases in your gang hour costs for handling Volkswagens? A. Other than the wage increases?

* * *

[219] Q. During this period, were you able to increase the productivity per gang hour in the handling of Volkswagens? A. The productivity—

Q. Rate per gang hour. A. I believe we did from 1961; through better vessels, we were able to increase our production.

Q. And when you say better vessels, what does that mean? A. Frankly, that is the key to this whole thing, the vessel, because the ship gang controls the production and not the dock gang, and as the vessels improve, in other words, McGreggor hatches or pontoons, special decks for the securing of automobiles on the vessel itself, the gear on the vessel is the key to the production of automobiles.

Q. That makes it easier to remove the vehicles from the vessel? A. Yes, sir.

Q. Is that what you are saying? A. Yes, sir, and the easier it is the more cars an hour they put out.

Q. Short of the improved rate, by reason of improved vessels, have there been any other methods of handling vehicles which would increase the rate of productivity? [220] A. I am sorry, what do you actually mean?

Q. Anything— A. In the form of a machine or man-hour, or—

Q. Any mechanical devices—I am talking about mechanization or work improvement practices which would reduce the number of gang hours needed for handling Volksagens. A. We use the chain gang structure on the vessel we did when we first handled the cars in 1954. Now, I say the key to the unloading of Volkswagens or any other automobile or any cargo is the ship's gang which is separate from a dock gang, but as far as the ship goes there hasn't been any change in gong structure.

* * *

[223] Q. Assuming that a commodity is greater in volume on a measurement basis, on a measurement ton basis, than on its weight for the freight making purposes, it could be manifested, could it not, on a weight basis, but at a higher rate, to reflect the extra volume? A. I would think that they would.

Q. So that how it is manifested has little to do with the problems of a discharge or a loading operator? A. That is correct.

Q. Is that correct? A. That is correct, sir.

* * *

[224] Q. Referring back to this average cost in '61 of approximately $10.45 per unit, or a rate of discharge of $10.45 per unit, in computing such a rate what do you as a

stevedore expect to receover over and above your costs? A. Direct costs?

Q. Over and above your direct costs. A. Profit?

Q. Including profit.

Mr. Zimmerman: I think I might—the profit margin, again, I think is a confidential item for a stevedore contractor. If Mr. Horsman is able to give some sort of a round figure which will satisfy Mr. Madden, that might not be objectionable, but I don't believe he should be asked to state what his—

Mr. Madden: A range.

The Witness: Over our direct cost, we put it on so many dollars a gang hour, ranging from 12 to 15 dollars [225] a gang hour, depending on the location and depending on the operation.

Now, on this particular case of the 1045, I don't know what we used as our overhead gang cost, but it ranges between 12 and 15 dollars, and that is to take care of equipment, supervision, administration, and return on investment.

Now, to arrive at a cost per car, then you just divide the number of cars you are doing an hour into that gang cost, and you come out with less than a dollar a car, and this is the general practice of all stevedores.

By Mr. Madden:

Q. In other words, in this rate you certainly would not expect to be able to recover as much as a dollar a car for your profit? A. We would be very happy when the operation turns out so that we recover a dollar a car over our direct expenses.

Ellet G. Horsman—for Complainant—Direct

Q. Now, if sedans are assessed on a measurement ton for the mech fund purposes, do you know how much per car that amounts to? A. On a measurement basis?

Q. On a measurement basis.

Mr. Zimmerman: Isn't that in the record?

The Witness: I should know.

[226] Mr. Madden: I am sure it is, but I am—

The Witness: May I say approximately?

By Mr. Madden:

Q. Surely. A. $2.75 to $3.25. On sedans—

Q. Yes. A. —it is about $2.70 or so.

Q. I will remind you it is probably somewhat less than that. A. $2.40 maybe.

Q. In any event, it is between two and three dollars, you will say? A. Yes.

Q. And I think the record will bear this out. For the transporters— A. It would be more.

Q. It would be more? A. It would be up in the $3 range.

Q. So that assessment alone is greatly in excess of anything you would hope to recover in the average rate that you were charging Volkswagen in 1961? A. We couldn't absorb that assessment.

Q. And I will repeat, then, since 1961 have you found any mechanization or work improvement method by which you could effect savings which would permit you to realize [227] savings, permit you to absorb this assessment? A. Our gang structure is approximately the same today as it was in '61. On the ship it is exactly the same. On the dock, as I say, we put men or take men off as we see fit, depending on where we are going to park the cars, but that is an operational problem which we have always had the right to do.

Q. Do you handle any cargo in which the increased cost per gang hour is as greatly affected by the mech fund assessment as automobiles? A. Not in volume, I don't think.

* * *

[229] Q. Do you see the manifests of the members? A. I have seen them, but it is not a practice for us to have them in our office. It is a practice for the steamship company to break down the tonnage in his own office, giving the stevedoring company a certified copy of the tonnage based on the stevedoring contract that he may have.

Q. You in effect rely entirely upon the report that you receive from the steamship company in making the report to PMA, as to whether the cargo is reported on a weight or a measurement ton basis? A. Yes, sir.

Q. In performing your services aboard the vessel and on the docks, do you have any special equipment to handle Volkswagens? A. Yes.

Q. What is it? A. It is a patent bridle device that picks the car up from the hold or the 'tweendecks of the vessel to the dock. It protects the car and gives the car greater protection from damage, and it is a device that has improved to a certain extent the production.

Both Volkswagen manufacturers have manufactured this type of gear, and they furnish to their stevedores this equipment.

[230] Q. Do you purchase it? A. We purchase it.

Q. It is your equipment? A. Yes.

Q. How long have you had this? A. I would say four years. There have been several changes in the period of four or five years, but we have had the present one about three or four years.

Q. Now, what about on the dock? What equipment do you use? A. We use what is referred to in the stevedoring business as a jitney. A jitney is a tractor with a model

engine, and in front of the jitney we have a foam rubber pad which pushes the automobile from the hook where it was left to a storage point in our yard.

Q. How about in Long Beach? A. In Long Beach, we pull them. The longshoremen will not push them in Long Beach, but they pull them. In San Francisco they will not pull them, but they push them.

Q. Is there any special equipment needed for pulling them? A. Just a line to—

Q. Is there any special hook? A. You have to have a special hook not to damage the bumper, but it is something that can be fabricated in your [231] shop.

* * *

Q. What would you say was a typical capacity for autos of one of these modern automobile carriers which Volkswagen chartered? Do you have any idea of approximately the number of vehicles that such a vessel carries? A. We have had them up to 1300 cars per ship.

Q. Now, if we assume that the cargoes are roughly three-quarters sedans and one-quarter transporters, is there [232] any convenient way that you could estimate the number of measurement tons that that cargo would constitute? A. Let's round it off and say a thousand cars, and they measure, the average I think was placed at ten there in the Leader.

Q. Approximately 10,000 measurement tons? A. Yes.

Q. Now, assuming the average cost for discharging those vehicles during 1961 at $10.45, the cargo handling costs would total approximately how much money there? A. About $11,000, rounding it off again, it would be $10,450, on the basis of units.

Q. Now, what would be the mech fund assessment on 10,000 measurement tons? A. What did we establish was the mech fund on a sedan? Was it $2.40?

Mr. Zimmerman: Well using the tonnage figures.

By Mr. Madden:

Q. Use the tonnage. The measurement tons, on 10,000 measurement tons. A. Times—

Q. 27½ cents. A. Yes, 27½ cents.

Q. That would be approximately $2,750? A. Yes.

[233] Q. Which is readily computable as being an increase of the discharged cost of the fraction made by 2,750, divided by— A. Divided by 10.45.

* * *

The Witness: The mechanization fund of $2,750 represents approximately 25 per cent of the total stevedoring costs on a thousand automobiles.

By Mr. Madden:

Q. On 10,000 measurement tons of cargo, can you estimate the average stevedoring and terminal costs other than automobiles?

* * *

The Witness: Can you name a particular commodity?

[234] *By Mr. Madden:*

Q. We will say cotton. A. Cotton?

* * *

Q. Can you compute what you would estimate to be an average cost of discharging 10,000 tons of baled cotton? A. Stevedoring and terminal, or just stevedoring?

* * *

[235] The Witness: Yes.

By Mr. Madden:

Q. And how much do you estimate that to be? A. $10 a ton, $10 per 2,000 pounds.

Q. And the mech fund assessment on that 10,000 pounds at 27½ cents is the same, I take it, as 10,000 pounds of Volkswagen? A. Yes, it is assessed on a weight basis.

Q. Can you compute the percentage increase of the cost of discharge? A. It would be about three per cent, wouldn't it, 2.7?

* * *

Q. Mr. Horsman, you stated that you handled discharge, [236] unloading of cargoes for common carriers, and—A. Contracts.

Q. And contracts? A. That is right.

Q. That is chartered vessels? A. That is right.

Q. Have you any idea about what the percentage between those two are? A. On what, sir?

Q. Between chartered vessels and common carriers. A. For what type of cargo, all cargo?

Q. All cargo. A. Well, I can only speak for my firm.

Q. Yes. A. About 90 per cent of it is liner business or common carrier.

Q. In reference to cars, what percentage of it is Volkswagens? A. I would say that they represent about 90 per cent of the automobiles we handle.

* * *

[237] Q. To your knowledge, do you know of any movement of chartered cargo to the Pacific Coast that moves in greater volume than Volkswagen automobiles, excluding bulk carriage? A. If you apply it to a measurement basis, no.

Q. How about number of ships? A. Could you ask that question again?

Q. How about the number of ships? A. No, the original question.

Q. The movement of chartered—

Examiner Theeman: Well, let's read it back, the original question, please.

(Record read.)

The Witness: I think that they are the largest.

I am only thinking of steel commodities that are moving in private vessels but, as I say, if you applied a measurement, no. Volkswagen is the largest, and in the number of vessels I would say that they are pretty much the largest contract [238] carrier here on the Pacific Coast.

By Mr. Madden:

Q. You have filed protests, have you not, with PMA, as to the impact of the measurement tonnage basis of assessment on vehicles? A. We have, and I believe that my letters or letters from my firm are part of the record.

Q. And in those letters, did you state to PMA whether or not it was possible for you to absorb the increased assessment?

* * *

A. Whether I wrote the letter or not, we couldn't absorb it, and whether I made myself clear in this letter to [239] Pacific Maritime Association, I don't know.

* * *

Q. Have you discussed the problem of the assessment on Volkswagen automobiles with other stevedoring companies who handle them on the Pacific Coast?

* * *

Mr. Zimmerman: Yes or no.

The Witness: Yes.

By Mr. Madden:

Q. In any of these discussions, did any of them indicate that they thought it was possible to absorb the assessment within their operation? A. No.

* * *

Q. What other employer members of the PMA have you discussed this problem with? [240] A. Other members of the PMA?

Q. Yes. A. Quite a few. Namely, Mr. Peter Teige.

Q. I mean direct employer members, the contracting stevedore members, and the terminal operator members. A. We have discussed it at PMA meetings, the stevedores together have discussed this problem.

Q. Do you recall any particular time or place when it was discussed? A. In January 1961, at 16 California Street, and I don't know the date.

Q. Was that a meeting of the PMA? A. I believe there was a meeting of the PMA that month on the establishment of the formula or format to be used for the assessing of various cargoes at which time it was indicated that the assessment would be based on "as manifested"; then some weeks later Mr. Saysette clarified it, pointing out that automobiles, regardless of what they are freighted as, would be on a unit basis.

This gave us the opportunity to discuss with the other stevedores what they had done or what they were going to do, but I might point out these discussions took place during meetings at Pacific Maritime Association.

Q. It would be fair to say at least that there was uniform agreement that it would be impossible to absorb the [241] assessment among the contracting stevedores with whom you talked?

* * *

Q. Was it the uniform opinion of the contracting stevedores with whom you talked that the assessment could not be absorbed by them? A. Yes, when placed on a measurement basis.

* * *

[242] Q. Are either of your companies members of any agreements which have been filed with the Maritime Commission? A. No, sir—let me reanswer that.

The stevedoring contractors of the Pacific Coast was formed last year with the approval of the Federal Maritime Commission.

Q. Is Marine Terminals Corporation still a member of the San Francisco Bay Carloading Conference? A. Yes, sir.

Q. That agreement was filed, wasn't it? A. Yes, sir, some years ago.

Q. And your Southern California company? A. Under the Southern California—

Q. Carloading tariff? A. Carloaders Association.

Q. Those agreements recite, do they not, that your companies are other persons subject to the Shipping Act? A. (No response.)

Q. Are you familiar— A. I am not familiar with them.

Q. But you are signatory parties to them? A. We are.

Q. And to this more recent— [243] A. This Association, yes.

Q. What is the purpose of this recent Association? A. So that stevedores with mutual problems can get together and talk about these mutual problems. It is something that we needed for many, many years.

Q. And that agreement has been— A. Filed with the FMC.

Q. Filed with the FMC? A. And approved.

* * *

Ellet G. Horsman—for Complainant—Cross.

[244] *Cross-examination by Mr. Zimmerman:*

* * *

Q. Are most PMA assessments included in the commodity rate which you quote to Volkswagenwerk? A. The man-hour assessments are included in the per unit charge, yes.

Q. Are there any PMA assessments that are not included other than the mechanization fund assessments? A. No, sir.

[245] Q. After the mechanization fund went into effect, did you offer to establish a new commodity rate with Volkswagenwerk which would include the mechanization fund assessments? A. Yes.

Q. What was Volkswagenwerk's answer to that proposal? A. They didn't accept it.

Q. I would like you to look at Exhibit 9, a letter which you wrote to Mr. Saysette of March 9, 1961, and referring particularly to the fourth paragraph, did Volkswagenwerk advise you as to what they would do if you attempted to include the mechanization fund assessment in the commodity rates? A. Well, it says here—it answers it in paragraph 4.

Q. Yes. And what was their advise to you? A. They also have indicated, their agents, that if our rates are renegotiated and the assessments placed in the rate, they will continue to deduct the 27½ cents per measurement ton.

Q. Now, at this time had you offered to quote them a commodity rate which was more than the previous commodity rate in order to absorb the mechanization fund? A. If I remember—I don't know if I did it by letter [246] or verbally, but I informed Volkswagen that we could absorb the mechanization fund if it were placed on a weight basis. It made it less than 20 cents, if I am not mistaken.

Q. Twenty cents per auto? A. Yes.

Q. And you had advised them that you could absorb that much in your current commodity rate? A. We were ready to do it, yes.

Q. Did you offer to quote them a new commodity rate which was greater than your old commodity rate and still absorb a part of the mechanization fund on a measurement ton basis? A. Yes, I submitted some rates based on the calculation that the 27½ cents would be assessed on a measurement ton. At the time we took the experience we had on the last year, and the rate was not the same as it was, plus the assessment. It was a new rate taking into consideration the past experience and the new mechanization fund assessment.

Q. And was that the proposed rate which Volkswagenwerk declined to accept? A. They declined to accept it on the basis that they would not pay the fund on a measurement basis.

Q. Subsequent to that refusal, did you continue to work Volkswagenwerk's cargo at the previous commodity rate? A. Yes.

[247] Q. And was that rate subsequently renegotiated? A. Yes.

Q. And was the rate increased or decreased? A. I believe it was decreased.

And has it been renegotiated since that time? A. Yes, it has. The procedure in most cases that all stevedoring rates are negotiated once a year, taking into consideration changes in wages, manhour assessments, and the units per hour in the case of Volkswagen.

This is a practice that is done throughout the industry in most cases.

Q. You have mentioned having discussions with other stevedores. In those discussions or at any time was there any agreement reached as to how each of the stevedores would handle the mechanization fund assessments? A. No.

Examiner Theeman: Did any of the stevedores mention how they would handle the mechanization fund without having arrived at an agreement?

The Witness: It was all, "What are you going to do? What are you going to do?"

"Gee, I don't know."

Examiner Theeman: Did they answer all with this, "What are you going to do?"

The Witness: There was nothing concrete. I think [248] some of them indicated, "Well, we are going to have to charge them."

Let me for the record—we bill—

Examiner Theeman: Now, I am just talking about the conversations now.

The Witness: No, sir.

Examiner Theeman: When you say, "No, sir," you mean what?

The Witness: There was nothing concrete, I mean no specific answer that this is how we are going to bill it.

Examiner Theeman: Or how we are going to handle it?

The Witness: Handle it.

By Examiner Theeman:

Q. Do you remember the name of any of the particular stevedores you had the conversations with? A. Yes, they were all stevedores involved in this case. There was Mr. Ebby of California Stevedore & Ballast Company, Mr. Smith of Seattle Stevedoring Company, Mr. Whisnant of Brady-Hamilton Stevedoring Company, Portland, and I believe John Anthony of Associated Banning Company. This took place, as I say, again, during the meetings of PMA at PMA.

* * *

[253] Q. Now, you mentioned handling Volkswagens for common carriers or liner services, as well as for Volkswagenwerk. Have the mechanization fund assessments on the autos which you discharged for common carriers been paid? A. Yes.

* * *

[254] *By Mr. Zimmerman:*

Q. You have indicated that you handle these autos both for common carriers and for Volkswagenwerk. Now, you have been assessed certain mechanization fund assessments in connection with the autos handled for common carriers. Have any part of those assessments been charged in any way against Volkswagenwerk? A. No.

Q. Have any part of the assessments in connection with handling autos for Volkswagenwerk been charged against the common carriers? A. No.

Mr. Zimmerman: I have no further questions.
Examiner Theeman: Mr. Ransom?

By Mr. Ransom:

Q. This gadget or device which you purchased from Volkswagen and started using about three or four years ago, I think you said, did it result in any savings in cost to you? A. Yes, in claims.

Q. In your Los Angeles operation, Mr. Horsman, did you since the mech fund went into being effect the elimination of some men from the dockside part of the stevedoring or terminal operation? A. Yes, I believe that we asked for the right to [255] change something that we should have done years ago. It is rather embarrassing to answer this question, because it was an oversight as far as the operations go.

We wanted to operate the dock with men, depending upon the location of the cars, where they would be placed. In some cases we used more men on one ship and less the next, depending on the type of cars, the dealer arrangement, and I believe we asked the steering committee to give us approval to make changes on the docks down in Long Beach when we saw fit.

Yes, to answer your question. Yes, there has been.

Q. The net result was the approval of a change in work practice which eliminated some manhours of work? A. Yes. Again I say that this is something, Mr. Ransom, we always had a right to do, to request change in practices. I am afraid that we took advantage of it rather late.

Q. Would you not agree with me that perhaps rights of this sort are now granted more freely and with less turmoil, if granted at all, prior to the improvement fund? A. This was a very serious situation in Los Angeles and Long Beach area, which was the dockhands.

> Examiner Theeman: Excuse me just a moment. Could we place this, so far as time is concerned?
>
> Mr. Ransom: He has already testified that what I [256] am talking about was since the inception of the mechanization fund.
>
> Examiner Theeman: I am sorry, I hadn't caught it. Continue.
>
> The Witness: We had this right before. This was a type of change that could be made before.

By Mr. Ransom:

Q. But what I am suggesting to you is that it might have been a right which you considered you had before, but perhaps it might not have been so easy to exercise it prior to the fund. Would you agree to that? A. It might.

Q. As a matter of fact, particularly in Los Angeles, whether by autos or otherwise, there has been some general improvement in the attitude of the workers as to changes, hasn't there? A. There has been a tremendous change in the operation of the docks in the Los Angeles-Long Beach area since the mechanization fund, especially in palletizing, car work, depalletizing, and work like that. We have accomplished much on that, yes.

Q. Has there been a general improvement since this mech fund in matters of work stoppages, let's say, work stoppages or wildcat strike, and things like that? A. Yes, sir.

[257] Q. And that redounds to the benefit of the entire industry? A. Yes.

Q. Has there been an improvement in such things as—I guess it is known as slowdown practices among the men? A. In isolated cases, we still have the problem, but the attitude of the regular longshoremen is that he works the best he can, and then as I say, in isolated cases, you also have that problem of either deliberate or a slowdown, or they don't occur as they have in the past.

Q. But in general, the attitude has improved since the mech fund? A. The attitude?

Q. Yes. A. Yes.

Q. Leaving automobiles aside for the moment, are there cargoes which have resulted in no productivity increase since the mech fund, and are there cargoes which have resulted in productivity increases both ways? Is that right? A. Yes, but in general the tons per hour have not changed.

Q. Then that doesn't change your answer to me that it is, "Yes," in some cases and "No" in others? A. I would say in general, since the mechanization fund, to be very honest with you, we have not seen an [258] increase in tons per hour. We are enjoying less work stoppages, but we could not increase production.

Q. Have you ever handled Renaults? A. Yes, sir.

Q. Do you happen to know what the weight of a Renault is, and its measurement tonnage? A. It is approximately the same as a Volkswagen. Let's take the Dauphine.

Q. Yes. A. I think it measures about the same as a Volkswagen sedan, and it weighs—its weight is about comparable.

Q. What about Fiat? A. That would also run—Fiats, Renaults, and Volkswagens—about the same.

Q. Is the Renault an air-cooled engine? A. No, that is water-cooled.

Q. Would the fact that the Volkswagen is an air-cooled engine result in its being somewhat lighter? A. I don't know.

Examiner Theeman: Do you know that?

The Witness: I don't know.

By Mr. Ransom:

Q. Have you handled Fiats? A. Yes, sir.

Q. In your handling of Renaults and Fiats, have you

* * *

[260] Q. Whatever contracts have been made, have Volkswagen been aware that there has been as part of the costs that make up your bill, this measurement ton assessment for dues? A. I believe that they would be aware. It was a very extensive negotiation.

Q. Then you know there was? A. Yes.

Q. Have they complained about that one to you? A. Germany has a tendency to complain about all costs.

(Laughter.)

Q. They haven't refused, as they did with respect to this mech fund assessment, called it out? A. Franz Klaffs, when he was associated with [261] Volkswagenwerk, made

it a point to ask the question to me why the cargo dues were placed on a measurement basis, rather than on a weight basis, and my answer was that I gave him a copy of Mr. Saysette's letter of September 1958, and I think this is what we have to do.

* * *

Q. In other words, it didn't get the same treatment as the mech fund? A. No, sir.

Q. By them? A. No, sir.

* * *

[262] Q. Do you recall a membership meeting in January 1961 when the program was voted on? A. What was the date of that?

Q. January 11, 1961. A. No, I was in the East. However, members of my firm were there.

Q. Do you happen to remember whether your firm voted yes or no on it? A. I don't remember, but I don't think there were any assenting votes.

Q. Pardon? A. I believe that we did vote for it.

Q. That you did vote for it? [263] A. I can't say, but I am pretty sure we did.

* * *

[264] Mr. Zimmerman: I found that I had skipped one technical question, and I can take it either before or after.

Examiner Theeman: Why don't you take it? It might affect Mr. Madden's questions.

By Mr. Zimmerman:

Q. Now, in connection with the manhour assessments for terminal services, has that assessment been paid by Marine Terminals in connection with the handling of Volkswagen autos? A. Yes.

Q. And that assessment is not in question in your litigation with Volkswagenwerk, is that right? A. I don't think so. I hope not.

(Laughter.)

Mr. Zimmerman: Thank you.

Examiner Theeman: Mr. Madden.

Redirect examination by Mr. Madden:

Q. Mr. Horsman, Mr. Zimmerman mentioned that the rates were renegotiated after this base period of 1961, and you said that it had been renegotiated at a lower rate. Has it been renegotiated again since that? A. Oh, yes, since Mr. Curtis has been a part of the Volkswagen organization, he negotiated after each change in wages the first Monday of June each year.

[265] Q. And has the rate been lower or raised? A. They are enjoying a lower rate than they were in 1961.

Q. Has there been any other charge that has been changed in that rate, for example dead time? A. Oh, yes.

Q. You might explain briefly what the effect of that change in the dead time means. A. Because of the type of cargo, one commodity per vessel, we took the risk at one time of having dead time. Dead time is a period of time between when the operation is completed by the men until the time they are guaranteed. This can be a substantial amount of money, depending upon the circumstances or the mood of the men, and at one time we absorbed all the dead time.

Examiner Theeman: By guaranteed, you mean under the labor contract?

The Witness: Yes, sir. The recent negotiations, the principal's agent, Mr. Curtis, and Wolfsburg, agreed that we have a formula now for dead time

where our firm cannot be hurt as much now as it was in the past. They are willing to pay us for a certain percentage of the dead time. It is a formula, and it is a rather complicated formula, and I think it is a very fair approach to the dead time problem that we have in the industry.

* * *

[267] Q. When you mentioned the assessment for discharging Volkswagens from common carriers had been paid, those assessments, I take it, were paid by your firm to the PMA fund? A. Yes, and we collected.

Q. You collected it from whom? A. The steamship operator.

Q. The steamship operator? A. Yes, sir.

Q. You have no knowledge, then, whether the steamship operator collected it from Volkswagen or not, do you? A. No, I don't, but I believe that it hasn't, because one of the largest common carriers of Volkswagen told me on a common carrier basis that he could not pass that cost on to Volkswagen.

[268] Q. That was the owner's agent out here for the company? A. That was the owner's representative, speaking for the owner.

* * *

[272] Whereupon, PETER CURTIS was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Madden:

Q. Will you state your name. A. Peter Curtis, C-u-r-t-i-s.

Q. And what is your position? A. President, Automar, Inc., 260 California Street, San Francisco.

Q. Prior to your position with Automar, Inc., with whom were you associated? A. I was vice-president, Winchester Agencies, Inc., San Francisco.

Peter Curtis—for Complainant—Direct

Q. In your duties in these two positions, did you have an association or perform services for Volkswagenwerk AG? A. Yes, I brought to Winchester Agencies the agency representation of the vessel under charter by Volkswagen. I had an agency in San Pedro which handled the Volkswagen [273] charter ships before I joined Winchester. The Volkswagen extended that representation to my new employer when I joined them.

Q. Would you describe briefly what this service consists of? A. There are two functions. One is a husbanding agency function; that is to say rendering port agency services to the vessel or vessels themselves.

Q. All right. A. Secondly, commencing in August 1961, the representation was extended to that of Volkswagenwerk, called coordinating agent. In that capacity, the coordinating agent is supposed to assist Volkswagen in negotiating stevedore contracts, selection of stevedores, and terminal operators, liaison with the distributors of the automobiles. I think that is about it.

Q. Liaison with the distributors was for the purpose of delivery? A. Delivering the automobiles to the distributors.

Q. How are vessels brought to the Pacific Coast from Germany by Volkswagen? A. How are vehicles brought or vessels?

Q. Vehicles. A. Presently there are two methods. One is under berth term arrangements with common carriers. At the present [274] time that consists of berth terms arrangements with Hanseatic Vaasa Line, and with Wallenius Line. It is—it has in the past also included Fred Olson Line. The other method is under vessels under time charter by Volkswagen, under lump sum FIO single-voyage charters, and by vessels under contracts of afreightment for the consecutive voyages.

* * *

Peter Curtis—for Complainant—Direct

Q. In time charter and consecutive voyage, FIO type of arrangement, whose responsibility is it to obtain the discharge of a vessel? A. The charterer.

Q. And that would be Volkswagen? A. That is Volkswagenwerk.

Q. And your function in that connection is what? A. To assist Volkswagen in negotiating stevedoring contracts, to make recommendations to Volkswagen on stevedore contracts. When I say stevedore, I mean including [275] stevedore and terminal, and to cooperate with the stevedore terminal operator and, at the same time, supervise the stevedore terminal operator's performance.

* * *

[276] Q. Do you know how many chartered vessels per year come to the Pacific Coast during, say, 1961 and 1962? A. In 1962 we averaged approximately three and a half chartered vessels a month.

Q. How about 1961, was that more or less? A. There would have been fewer vessels in 1961.

Q. To your knowledge, are there any other charter vessels carrying cargo to the Pacific Coast, other than bulk carriers that move in as great a volume as Volkswagen? A. I know of no other dry cargo movement with charter vessels, bulk or otherwise, that is as large as Volkswagen's charter operation, from the point of view of total deadweight tonnage of the vessels engaged, or in the number of vessels engaged.

Q. How are the vehicles that are shipped by Volkswagen [277] on these chartered vessels manifested? A. Per unit.

Q. Has that been the case as long as you have represented Volkswagen? A. Yes. I should point out, Mr. Madden, however, that when I say manifested, there is no freight shown on the charter ship manifests. Many of the charter ships are under a time charter. Many of the ships are under

a lump sum FIO. Volkswagen always manages to put as many cars aboard as they can squeeze in.

Q. The manifest that is prepared, does it show weight? A. It always shows weight in kilos.

Q. Does it show measurement? A. There have been some cases, I would say generally isolated cases, where measurement has been shown as well as weight on the manifest. Many of the agents who perform the husbanding and documentation services at the loading port are agents handling many, many types of vessels, and in most liner trades both weight and measurement is shown on the manifest.

That is the reason why some of the manifests have shown weight and measurement for the cars.

* * *

[281] Q. Can you make a comparison of a typical charter shipment of Volkswagens with respect to their weight, as compared to their measurement? A. Yes.

Q. Will you do so? A. Mr. Herzfeld yesterday I believe when off the record referred to the egg-shape or egg type models of Volkswagens, which appeared in recent advertisements, and let me use that expression to describe the cars, which are smaller and are in silhouette perhaps somewhat similar to an egg, which would include the sedan, the sun roof sedan, the convertibles, and the Ghia coup, and then let us refer to the others as box-shaped vehicles, which will include all of those in the transporter category, including the pick-up truck.

The average weight of the egg-shaped vehicles is 1,643 pounds each. The short ton equivalent is 0.8, or eight-tenths of a weight ton. The cubic measurement of the egg-shaped vehicles averages 312 cubic feet, which converts to a measurement ton of 7.8.

The measurement as seen is almost ten times that of the weight. The box-shaped vehicles will average 2,193

pounds, or a short ton equivalent of 1.1 ton. The average [282] cubic of the box-shaped vehicles is 45 cubic feet, or a measurement ton equivalent of 11.4 measurement tons.

As it will be seen in the box-shaped vehicles, the measurement exceeds ten times its weight. In the charter ship movement during '62, and continuing now into '63, out of every four units my impression is that the distribution would be three units in the egg type, and one in the box type.

If we apply that three to one ratio, we come out to an average of the four units, each one would be 0.9 short tons in weight, and 8.7 measurement tons.

Q. From a study of your records on the cost of discharging these vehicles during 1962, can you state the average discharge production that was accomplished per gang hour? A. Well, let's put it this way, that Marine Terminals Corporation and Volkswagenwerk have agreed that they will consider that the stevedoring rate for the year beginning September 1962, and running for 12 months, will be based on 16.54 autos per gang hour at San Francisco, and 17.75 autos per gang hour at Long Beach, which we all considered to be the net discharging average for the 12 months ending December 1962, in the actual discharge of the Volkswagen charter vessels, exclusive of the dead time.

That would convert, assuming you had an equal number of cars, to the Los Angeles area and here, and it is [283] approximately, that would work out to an average of 17 autos per gang hour which, on the basis of the weights and measurements referred to previously, would work out to an average production per gang hour of Volkswagen autos of about 15.3 short tons per hour, and correspondingly to 148 measurement tons per gang hour.

Q. Now, what would be the average gang hour weight during a typical shift of eight hours? A. Assuming six hours straight time, two hours overtime to make up a normal eight-hour shift, the wages alone, exclusive of in-

surance, taxes, and any PMA assessments, would amount in San Francisco, for a typical Volkswagen auto gang, $69.17 per gang hour, utilizing 18.75 men per gang; and at Long Beach $76.72 per gang hour average wages, with 21 men per gang.

If again we assume, and it is reasonably close, that it is approximately 50 per cent Long Beach and 50 per cent San Francisco, the charter vessel average will be $72.95 per gang hour for the California ports.

Examiner Theeman: Give me that figure again.

The Witness: $72.95, Mr. Examiner.

On the basis of average production, that we previously talked about, in other words, 15.3 short tons of automobiles, or 148 measurement tons, on—those gang hour costs of $72.95 in California ports versus 15.3 short tons [284] is the equivalent of $4.76 per short ton average.

$72.95 in wages versus 148 measurement tons would be the equivalent of 49 cents per measurement ton, if we applied the wages againt measurement tons, emphasizing there that those are wages, no fringe assessments or insurance attachment or overhead.

By Mr. Madden:

Q. Now, if the mech fund assessments are added to these wages, what is the effect upon the comparative cost? A. It is just a question of dividing and multiplying the factors we have already had which, if you base your assessment on a measurement ton, the mech fund assessment would be 27½ cents versus wages of 49 cents per measurement ton.

In other words, the mech fund would represent a cost equal to 56 per cent of the basic wages. If applied to a

weight ton, however, the mech fund of 27½ cents per short ton and wages, as we said above, $4.76 per short ton, the mech fund equals 5.8 per cent of the wages.

In other words, when the mech fund is applied on a measurement ton basis, speaking only of wages, now, the mech fund equals 56 per cent of the wages, and when it is on a weight ton assessment it equals 5.8 per cent of the wages.

* * *

[285] Q. Are you familiar with what the total payroll during 1962 was for the ILWU in San Francisco? A. Well, the Pacific Maritime Association put out an annual report for 1962 on April 15th, of which there is a graph which shows shoreside wages, California, Washington, Oregon, and it shows wages for 1962 in that category of $103,953,362.

Q. Does the amount of the mech fund assessment appear in that report? A. I couldn't find it, but it did appear in the records under Exhibit 49.

Q. And how much was that? A. The mech fund collections from Exhibit 49 for 1962 amounted roughly to $5,200,000.

Q. What percentage is that of the total wages paid to [286] longshoremen during '62? A. That would mean the mech fund collections for 1962 represent an average funding burden of about five per cent of the total wages paid. That is on all cargo, apparently.

* * *

[291] Q. Would you state who are presently discharging Volkswagens for Volkswagen under the charter? A. In Seattle it is Seattle Stevedore Company. In Portland it is Brady-Hamilton Stevedore Company; in San Francisco, Marine Terminals Corporation; in Long Beach, Marine Terminals Corporation of Los Angeles.

Q. Do you know if there are any additional companies who discharge Volkswagens for the liner companies? A. (No response.)

Q. Could you name the others? A. Not reliably. I know that California Stevedore & Ballast in San Francisco is doing the work for one of the common carriers, and Associated Banning in Long Beach is, or Los Angeles, is doing the work for another one of the common carriers.

* * *

Cross-examination by Mr. Ransom:

* * *

[301] Q. And you are aware in negotiating for Volkswagen that that has been included in one of the costs? A. Yes.

Q. And that has been since you first started in this operation? A. I wasn't aware of it when I first started in the operation. I found out about it after I got into it.

Q. Were you aware that the mech fund had undergone a change from 27½ cents a ton, relating to stevedores, to 24½ cents, and then a 15-cents per man hour for clerking? A. Yes.

Q. And the 15 cents per man hour for clerking has been included in the rate and payable? A. It is included in the rate in California and has been paid. In Oregon and Washington, it is billed separately, in addition to the commodity rate, and has never been contested by Volkswagen, and has been paid, in addition to the other commodity rates.

Q. It has been what? A. It has never been contested by Volkswagen, and has been paid in addition to the commodity rates.

Q. It has been paid? A. The reason being that our stevedoring order for Washington and Oregon provides that our super cargo checkers are not included within the commodity rate.

* * *

[304] Q. Has Volkswagen or you particularly made a study of the Matson operation in their auto transportation? A. I am familiar with their cage system, as they call it,

in general terms. That is all. It is our understanding it is working out quite well.

Q. Pardon? A. It is our understanding it is working out quite well.

Q. Has Volkswagen made any attempt, to your knowledge, to take advantage of the Matson operation, the Matson type operation, to improve its own methods of bringing cars in and discharging them? A. The newest vessels that move into the Volkswagen charter trade will come in in May, and they are going to be larger than we have had up to now, and they are an improvement over existing Volkswagen charter ship arrangements, rather than adopting what I call Matson's plan.

You have different elements involved. You have a very expensive per diem cost on American flag operations. Your per diem cost on European flag vessels will be less. Your investment in Matson type operations for modification of the vessel is probably greater than the investment made on the European auto carriers, but it is our impression that production per gang hour on the type of vessel that Volkswagen has had in its trade since 1961 is comparable with the new [305] innovation that Matson has, so there is really not any reason for Volkswagen to change.

Q. Have you obtained from Matson any figures as to how they have increased their production since the mech fund went in? A. We have not talked to Matson directly. We are always glad to listen.

Q. So would your new vessels call for a change in method of discharging? A. No, it would be the same.

Q. Volkswagen Company has not, then, attempted to follow a system of drive into a cage and drive off on the vessel? A. No, that is the system I thought you were talking about. No, we have not. The return haul of the vessels in the trade from Europe to the Pacific Coast is

different than ships in the trade from the Pacific Coast to Honolulu, and coming back from Honolulu, all of which enters into the picture of why you design a ship a certain way.

Q. You gave some figures on the number of man hours per Volkswagen currently. A. Yes.

Q. Do you have those figures? A. Was that me, or was that Mr. Horsman?

Q. I didn't hear you. [308] A. No, I don't have that.

Q. And the Pacific Coast-European Conference is from the United States? A. It is an eastbound tariff. Is that right?

Q. I am not sure whether I understood your testimony about when the M&M fund went in, and the offers and acceptances between you and Marine Terminals on their stevedores.

Do you disagree with what Mr. Horsman said on that subject this morning? A. To what subject are you referring of Mr. Horsman?

Q. I am referring to Mr. Horsman's statement that they proposed to you a rate after the mech fund went into effect which was more than the prior rate, but not more than by the amount of the mech fund assessment. A. Well, that would be one area where I think I might disagree just slightly, but I don't think that Mr. Horsman's proposal was even acknowledged by Volkswagen. Volkswagen has consistently said they considered the measurement ton assessment utterly unfair, and they have had nothing to do with it.

Examiner Theeman: Mr. Ransom, my notes indicate that when Mr. Curtis was referring to the testimony by Mr. Horsman that he was referring to the terms of the contract with Volkswagen rather than negotiations.

Mr. Ransom: Well, that is what I am really asking [309] him about. My notes show that he said that Marine Terminals was asking for an increase to cover the cost of the M&M fund, and I am trying to develop whether he disagrees with my understanding of Mr. Horsman's testimony when they asked for an increase to cover part of the cost of the M&M fund.

Examiner Theeman: All right, ask him now.

The Witness: There was one proposal of Marine Terminals made that had the effect that Marine Terminals was going to absorb a few pennies of the two dollars and some-odd assessment per car.

By Mr. Ransom:

Q. I see. A. And it is my recollection that Volkswagen did not answer that on the ground I stated.

Q. When you stated that the non-member stevedore that you consulted with on this, would that be the Oakland Dock & Warehouse Company, or something like that? A. They were one.

Q. And you stated they said they would come up with some alternative arrangement? A. Yes.

Q. Would you explain that a little clearer? A. We did not encourage them.

Q. Pardon? A. We did not encourage them with an alternative [310] proposal. The relationship with the stevedores has been a good one. The stevedores have done a good job, and we are hopeful that we will never have to make a change.

Q. Then it isn't your position that Volkswagens or automobiles are the only cargo which would pay more on a measurement ton assessment than on a weight ton assessment? A. I was interested in Mr. Horsman's testimony

about the house trailer. I think that is an interesting example of another one of them.

I haven't thought independently of any others that would pay as big an increase.

Q. That wasn't my question. My question is, you don't contend that other cargo assessed on a measurement basis wouldn't pay more because they are assessed on a measurement basis than they would if they were assessed on a weight basis? A. I am sorry, I don't get that question.

Examiner Theeman: Will you repeat the question, please.

By Mr. Ransom:

Q. Maybe I can restate it. Any cargo that is assessed for the M&M fund on a measurement basis is going to be paying more than if it were assessed on a weight basis.

Examiner Theeman: Is that a statement or a question, Mr. Ransom?

* * *

[316] FREDERICK F. NOONAN was called as a witness by and on behalf of the Complainant and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Madden:

Q. Will you state your full name, please? A. My full name is Frederick F. Noonan, N-o-o-n-a-n, business address 310 Sansome Street, San Francisco. I am president of Waterman Corporation of California.

Q. Waterman Corporation of California represents Wallenius Lines? A. Yes, we are Pacific Coast agents for Wallenius Lines.

[317] Q. Is Wallenius Lines a common carrier by Water? A. Yes, they are.

Q. Do they carry Volkswagens to the Pacific Coast? A. Yes, they do.

Q. Under what terms of carriage, what are the terms of the carriage when they carry Volkswagens? That is, are they berth terms? A. Yes.

Q. Or FIO? A. No, the ocean freight rate is a unit rate, and it is a berth term rate where the vessel pays for the loading and discharging.

Q. How are Volkswagens manifested by Wallenius Line? A. By unit as a rule.

Q. Do they indicate the weight on the manifest? A. I am not really certain. I believe the weight and cube are both indicated, but I would have to check that.

Q. The freight rate is per unit? A. Correct.

* * *

[318] Q. You are familiar, are you not, with the so-called mech fund assessment? A. Yes.

Q. Or M&M fund assessment? A. Yes.

Q. Since the inauguration of the mech fund assessment [319] in 1961, has your discharging stevedores included the cost of that assessment in their billing for discharge of Volkswagens? A. Yes, they have.

Q. In billing, that billing is to Wallenius Lines? A. In care of Waterman Corporation in California, yes.

Q. Has Wallenius Lines protested against the assessment? A. Yes. When the charge was initially assessed, it represented a substantial increase in the overall stevedoring and terminal charges, and not only did we protest but we refused to pay it for several months in the early part, I believe, of 1961.

* * *

Frederick F. Noonan—for Complainant—Cross

[320] Q. When you say a substantial increase, can you give an approximate percentage increase? A. Approximately 30 per cent.

* * *

Cross-examination by Mr. Zimmerman:

* * *

[322] Q. What is the freight rate that Wallenius Line charges for carrying each Volkswagen? A. Well, the freight rates vary, depending on the size of the car. They have a tariff, and I think the ocean freight [323] probably starts at 150 and go up, depending on the large Mercedes cars paying a higher freight rate.

Q. It is not a special rate for Volkswagens, it is a rate for any auto? A. Correct.

Q. And the rate depends— A. Each type and model of car has its own ocean freight rate.

Q. Each type of car has its own rate? A. Right.

Q. So there is a special rate for Volkswagens? A. Well, Volkswagen has several different sizes and shapes, as you are well aware.

Q. Yes. A. And each size has a different rate.

Q. I mean does the tariff have a rate for Volkswagens, or does it have a rate for different sizes of autos? A. No, Volkswagens are listed as an auto, as a Simca, British Ford—you name it— every car in Europe, we attempt to carry from Europe to the Pacific Coast.

Q. And every car is listed by make in the tariff? A. Make and model.

Q. Make and model? A. Yes.

Q. Does the tariff refer to the size of the car in [324] establishing the rate, or does it just refer to the model in establishing the rate? A. Well, the tariff on some pages shows the actual measurement of the car, and the ocean freight rate.

Q. Aside from the tariff items covering Volkswagens, as particular autos, does Wallenius Lines have any separate contract with Volkswagen? A. Not that I am aware of. They may well have, but I have no direct knowledge of this.

Q. You mentioned an understanding with your stevedores as to refunding the assessments if this dispute were resolved. Is there any agreement in writing? A. No, this was entirely verbal.

Q. And you say that for the last approximately three months you have not paid the assessment, in any case? A. I believe on two vessels we made some temporary arrangements to pay these into an escrow agent locally.

* * *

[325] *By Mr. Ransom*:

Q. Mr. Noonan, your tariff as to cargo doesn't show the M&M fund as a separate assessment, does it? A. The tariff filing itself, you mean?

Q. Yes. A. No, nowhere in the tariff filing is the M&M assessment.

Q. Your tariff rate includes all discharging costs? A. The tariff is berth terms, correct. In other words, the carrier absorbs all discharging costs.

Q. Yes. The tariff was not amended at the time of the M&M fund or the mech fund assessment to give an increase in your price for autos, was it? A. Not that I am aware of, no.

Q. You said $150 to a certain figure. Are you quoting from memory the freight rate on a Volkswagen of any kind from Europe, or were you just picking that figure out of the air? A. I don't know the exact figure, but I don't believe I am too far off.

Q. Well, does Wallenius Line belong to the inbound conference from Europe, or is it a non-conference carrier?

Paul St. Sure—for Pacific, Intervenor—Direct

A. They are an independent carrier. They do not belong to a conference.

Q. Do you happen to know what the conference rate is on a Volkswagen sedan from the port of loading to the West * * *

[330] *By Examiner Theeman:*

* * *

Q. In early 1961, you protested and refused to pay the mech fund assessment. Do you know whether that was the same position taken by the other common carriers? A. I am trying to recall exactly who was present at this meeting that we had with the PMA board of directors on this, and I feel certain that all or, let's say, many of the other common carriers engaged in the carriage of cars from Europe to the Pacific Coast were present there. All were present, or were represented by their stevedore contractor—let's put it that way—and it is my impression that they were all very unhappy about this sharp increase in the cost.

Q. This was in the nature of a protest meeting? A. Yes, it was a meeting held with the directors of the PMA in which the Volkswagen representatives presented [331] their views, and several of us also presented our views at that time.

* * *

[341] Whereupon, PAUL ST. SURE was called as a witness by and on behalf of the Pacific Maritime Association, Intervenor, and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Ransom:

Q. Mr. St. Sure, would you state your full name for the record, please, sir. A. Paul St. Sure.

Paul St. Sure—for Pacific, Intervenor—Direct

Q. What is your present position? A. Well, I am president of the Pacific Maritime Association, and I am also a member of a law firm, St. Sure, Moore & Corbett.

Q. How long have you been the president of the Pacific [342] Maritime Association? A. Since March of 1952.

Q. Will you describe your duties as president of the Pacific Maritime Association? A. Well, I am the principal executive officer of Pacific Maritime Association, which is an incorporated non-profit organization of employers engaged in operating steamships, operating as stevedores in the various ports on the Pacific Coast, and as terminal operators.

The membership includes approximately 150 companies, and my duties are to act as executives in supervising the operations of the various departments of PMA, and primarily, in addition to that, to act as labor negotiator for labor contracts between the members of the PMA and the various Maritime unions, and to supervise the administration of those contracts.

Q. What would you say was the principal function of PMA, as such? A. Well, the primary function of PMA is to negotiate and administer labor contracts with the offshore and onshore maritime unions affecting operations on the Pacific Coast under a unit defined by the Labor Board with regard to longshore functions, and under a master contract likewise certified by the Labor Board for a unit embracing all American flag vessels headquartered on this Coast.

[343] Q. Would you state whether the Pacific Maritime Association is a rate making group or rate making conference? A. No, we have no connection with and no responsibility for rate making. Indeed, our concern is merely the negotiation of wages, hours, and working conditions for the people within the units that I referred to.

Q. Does the PMA function through committees, through boards of directors? How does it operate? A. Well, we

have—I will describe the staff structure of PMA first. There are probably 150 employees of Pacific Maritime Association. The organizational structure is a president—I am speaking of staff structure now—there are three vice-presidents, one a vice-president in charge of finance, Mr. Saysette, a vice-president in charge of labor relations, Mr. Goodenough, a vice-president-administration, Mr. Dellwig.

We have a director of offshore labor relations, manager of the contract data department, and an accident prevention bureau.

We have other staff members who attend such things as unemployment insurance claims. We likewise operate a central pay office for stevedores and terminal operators in each of the major ports. We have area officers with an area manager at each of the following port cities: Seattle, Washington; Portland, Oregon; San Francisco, California; and [344] Los Angeles-Long Beach, California.

They in turn have staff assistants.

The membership structure of PMA, as well as the corporate structure, provides for a board of directors and executive committee, and various standing committees such as one referred to as the Coast Steering Committee, as well as negotiating committees of operating people.

The number of operating people available who serve on the committees are reasonably few. Therefore, there is a good deal of interchange of responsibility from the point of view of the committee set-up, but the industry members do participate very actively in the day to day administration of the contracts, the administration of the functions of PMA, and in the actual negotiation of contracts with the various unions, though I am the official negotiator and the spokesman during these negotiations.

Q. Is the steering committee involved in the labor negotiations? A. They are involved both in the negotiations of labor contracts, and also in the administration of the contracts on a day to day basis.

Q. What union represents the longshoremen and marine clerks? A. The International Longshoremen and Warehousemen's Union.

[345] Q. Is that certified by the NLRB to act for them? A. Following the 1934 so-called general strike, they were certified as representing the composite unit on the Pacific Coast, covering all longshore operations at all ports from the Canadian border to the Mexican border, and particularly certified as the bargaining representative of workers employed by Pacific Maritime Association members.

At that time, the membership was in an organization known as the Waterfront Employers of the Pacific Coast, which had subsequently merged into Pacific Maritime Association.

Q. And the Pacific Maritime Association, then, is an employers group that are bound together to negotiate with the various unions? A. It is an association of employers which is a pattern which exists on this coast in many industries, and the sole reason for the association, apart from the things that have branched out, such as accident prevention and other functions, but the primary reason for the organization existing is to bargain as the employer representative for this union.

Q. Do you represent through your law firm other employer groups in other industries? A. Yes, the pattern I mentioned of employer associations for bargaining purposes developed largely on this [346] coast, beginning in 1936. After the passage of the Wagner Act, and since 1936 my firm and I have actively and still actively participate in the negotiation of multiple employer negotiation contracts with the labor unions in the fruit and vegetable canning industry

through an association known as the California Processors and Growers, which comprise about 80 per cent of the total fruit and vegetable pack in California, and in turn about 40 per cent of the national product.

Also, the Milk Product Manufacturers Association, a group of manufacturers of milk products such as condensed milk and dried milk cheese, butter, and other milk products, a similar association that has a contract for I would say 80 or 90 per cent of the employers in this field in California, all of the major advertised brands, and many farmer co-ops.

Here again these associations bargain on a unit basis usually after certification by the Labor Board of a master unit. Also, Retail Merchants Association of Alameda County, a group of retail department store operators who have similarly bargained on a group basis since 1936 or '7, and other groups, the Fluid Milk Distributors, in the entire Central Valley, and the metropolitan areas, and we have also represented other multi-employer groups in various other industries over a period of the last 30 years.

[347] Q. I think you have pretty well demonstrated that you are fairly well acquainted in the labor negotiation field. What I would like to ask you next is the process by which these other employer groups have bargained for wages, working conditions, fringe benefits, similar to or dissimilar to that which is undertaken by PMA. A. No, the pattern of bargaining or the method or technique of bargaining for a multi-employer group is much the same.

The groups really are based upon a common interest in that they are operating in the same area of either production or providing service. They are competitors from the standpoint of gaining business, and their price operations in that connection, but they have the community of interest that either voluntarily or by compulsion requires them to deal with the labor that they hire as a group.

I say some voluntarily and some under compulsion.

Many of these associations came together as a voluntary act of the competing employers. I thing PMA is one exception of this. I think it came together by government direction, and the members are actually required to negotiate and operate on a coastwide basis by reason of the Labor Board action on the composite unit for longshoremen, particularly even though the employers themselves historically preferred to negotiate at least on a port basis, but PMA, since the [348] mid-30's has been the type of multiple employer organization I have described.

Q. You are generally familiar, are you not, Mr. St. Sure, with the history of the ILWU and the labor negotiations and work practices on the West Coast? A. Yes, I am.

Q. Would you, as background to this mech fund plan, describe if you will the trend from, let's say, 1934 up to the late 1950's of the longshore work practices and the wage and benefit trends? A. Well, beginning with the maritime strike of 1934, which led to the coastwise unit and the initial ILWU contract, I have had familiarity with the operation because my first work in labor relations began in 1934 in connection with that strike and, although I did not become associated with Pacific Maritime Association until 1952, the fact that this is a maritime community required that during all of the period intervening between '34 and '52, that anyone in the field of labor relations maintain some familiarity with what went on on the waterfront, because it cut across the entire economy.

Beginning in 1934 until 1948, following a second maritime strike in 1936, which was a bitter strike, the relationship between the employer group on this coast of maritime labor relations and the ILWU was generally described [349] as a bad relationship.

Books have been written about it to describe the continuing pressures of the union to apply more and more restrictive work rules, both during negotiations and by a

process of job action, slowdown, and this involves such things as the addition of men that were not required on the job, the limitation of sling load limits, and a large variety of work practices that resulted in a declining productivity in all ports on this coast.

In 1948, the further bitter strike occurred which had over a hundred days duration. It involved a Taft-Hartley injunction which did not operate as a cooling off period, but by the union's own description involved a heating up period, and when the Taft-Hartley injunction expired the strike was resumed and continued for a long period.

Now, this strike resulted from an either philosophical or political difference, based on the theory that the Maritime would not do business with Communism. This was adopted by the ILWU that they would not permit their officers to take the oath under Taft-Hartley, and this became a strike issue.

Beginning with that period, and after this long strike, an attempt was made by the employer group to improve relationships as between the union and the employer group, and this developed into what was known as the "new look," [350] and when the strike finally was accomplished and settled, and the union had made very spectacular gains, both in the area of wages and the adoption of one of the first industry pension funds, there was a good deal of work done to endeavor to reverse the trend of constant work stoppages, work restrictions and slow-downs, and an attitude of extreme militancy on the part of the workers on the docks.

This didn't develop into much of a change and, indeed, during negotiations beginning 1952 when I was named president of the Pacific Maritime Association, we were continually trying to develop with the union some method of changing the attitude of the workers vis-a-vis the employers. We were also endeavoring to correct work practices by tightening up discipline, trying to avoid such

practices as what the union refers to as "four on-four gone", where eight men are employed in the hold of the vessel, four of them report to work and work half the shift, and then the other four come on and work the other half, and all eight were paid for the total shift.

These were things, outside the contract, but they were the type of conditions that had developed on this coast. One of the worst ports, by way of performance, was the Port of Los Angeles, but the other ports likewise suffered from these bad work practices.

Each year until 1957, and on two occasions, we [351] went to arbitration; the employers presented the picture of declining productivity, worsening work practices, work stoppages, many a day in each of the ports which were in violation of the contract but which were difficult to compensate for because of the peculiar rotary hiring method we have on this coast; by that I mean the men can stop work, but the work is still going to be there when they come back, and the only men available are men out of the hiring hall on a rotational basis, so the tendency was to press more and more for the union and for the employers to give more and more in the hope that they could get their cargoes out and the vessel unloaded.

Despite the fact that we presented this picture in arbitration, no correction came about, and each year we continued to add onto the wage cost and on top of a declining or worsening set of work practices and productivity.

Beginning in 1957, the reputation of Pacific Coast longshore operations, both by reason of bad productivity and high cost, had become so bad, both resulting in steamship lines going out of business in the intercoastal and coastwise trade because of the cost and the availability of rail and truck competion, and this likewise developed into a very large shipper pressure to bring about or try to find some method of bringing about a correction, a change in

trend, the reversal in attitude of the men towards the work, and towards [352] the employer.

We had many discussions with the officers of the International Union about this. They agreed that we had grounds for complaint. They likewise said that the responsibility was largely the responsibility of the industry to correct things which were outside the contract, but they likewise took the position that those things which we had agreed to by contract after all, even though we said that we were coerced into agreement, that we had made such an agreement, and we would have to live with it or buy it out.

Specifically, in 1957, I talked with Mr. Bridges, the president of the ILWU, and pointed out to him at that time that the pressure is on the employers, both stevedores and steamship companies, both foreign and American flag, by way of criticism from shippers, had become so great that whether he liked it or not, or whether I liked it or not, that we seemed to be heading for some kind of a showdown.

For example, we had a sling load limit in the contract which is unique on this coast covering various commodities, and the only exception to that sling load limit was what was refered to as a shipper's package load, which meant that if a unit of cargo was actually contained or strapped or put together by the shipper uptown, or some way from the dock, that load could go through even though it weighed not one ton, but two or three or four tons, the [353] sling load limit being essentially a one-ton limit, and the shippers, even though it was a greater cost to them to begin to unitize their cargo, were doing just that in order to escape the cost of handling on the dock, and the limitations by way of sling load and featherbedding, and other things that occurred on the docks.

We had such things as double handling. Any cargo that arrived at a dock, if it wasn't unitized, had to be taken

off the pallet board or off the truck and rehandled two or three times before it got aboard the vessel.

As a result of these discussions, plus the fact that some of the steamship lines, notably Matson, who are a major link between the Hawaiian Islands and the Pacific Coast, and whose rates are regulated by Government agencies, found that they were being charged by the residents of the Island of having ruined the economy of Hawaii by reason of freight rates.

Matson began to experiment in new cargo handling methods, the conversion of vessels, the introduction in greater degree of so-called van or container handling of cargo, and van type movement of cargo had been attempted on this coast previously, but had been stopped by the unions, particularly the longshore union.

Notably, in the case of American Hawaiian Steamship and Luckenbach, both of which have since gone out of [354] business, and as a result of these pressures, plus the Matson determinations to try and improve the situation by introducing new methods and devices, it was evident that the union itself—that is, the workers on the docks—were stepping up their resistance to change which had been continuous over the years and, indeed, the threat was that if cargoes were to be containerized and brought to the docks that they would not be handled by longshoremen, or that they would be handled but double-handled as in the case of the East Coast unions in the same issues, claiming that if a container of cargo arrived at the dock, the longshoremen would unload it, check it, and load it back again before it would go aboard the ship.

As a result of these discussions in 1957—again discussions between Mr. Bridges and myself about a need for a change in the overall attitude of the men, of the operation, of the contract, of the removal of the restrictions and the reversal of the trend of vessel productivity—the Interna-

tional Longshoremen and Warehousemen's Union called a coastwise caucus.

Q. May I interrupt first? A. Yes, sir.

Q. Did you and Mr. Bridges at that time get out sort of a joint statement of policy between you as to what your objectives might be? [355] A. That came later.

Q. That came later? A. It is my recollection. The ILWU operates in a rather unique fashion. They assert that they are, and I believe in fact that they are a rank and file type union. That is, the decisions are not made by the International officers and handed down. The decisions are made by delegates from the various unions elected for that purpose to authorize the International to take whatever action they have in mind.

This is not to say that the International officers don't endeavor to persuade or influence the results, but this is an actual method of operation.

Prior to this Portland caucus, the union, in each port appointed a committtee to survey what was going on by way of mechanical change, what the union accomplished by way of revising it, what the shape of things to come might be by way of possible change in methods of operation by the introduction of machinery, and try to make an estimate of what there was at stake from the point of view of the longshoremen:

If they should give up their resistance to change, and their continued diminishing pattern of productivity, and should permit the trend to be reversed.

A document was presented to the caucus as a report [356] of what they called their port labor relations committee amendment. It was an objective analysis of what had been going on over the years, and it ended with the declaration of the International officers of the union that the union had two ways to go. One, they could continue what Mr. Bridges described as the guerrilla tactics which

had been so successful over the years, or they could continue to limit and control productivity.

They could continue to fight the machine. They could continue to maintain restrictive work practices, and even add to them, but that he felt this was possible for a limited period of time only, and that while they believed they had the strength to do it, that it could lead or would lead ultimately to a complete showdown which could mean a disastrous strike, both to the industry and to the men that worked in the industry.

The second alternative was to bargain with the employers for a change in conditions, for a reversal of the trend, for the elimination of restrictive work practices, sling load limits, double handling, gang sizes, to permit the introduction of machines and methods that would be different and meant to permit an efficient operation without the employment of the men, and over employment of the men, or without the featherbedding or contractual restrictions. The caucus authorized the International officers to explore [357] the latter alternative, that is, the alternative on endeavoring to bring out a new basic contract with the elimination of the items the employers were complaining about in the total industry, provided the employers would agree to two things or two categories of things.

One, that the employers would agree that in the event they could get an efficient operation by bringing out the changes they desired and thereby there was a saving of wage cost in manhours, that the employers would share with the union members the savings that would result.

The second condition was that if the employers were to agree to this principle in bargaining on this basis, that the ultimate bargaining would have to provide that any changes which would bring about greater efficiencies would not result in unsafe working conditions nor result in a speed-up of the individual worker.

In other words, they were willing to talk about having the job made easier, though this might lead to increased productivity, their position being that their concern was not with productivity. Their concern was with working conditions, and if we could accomplish the productivity that was our business, but that we would have to pay a price for it, and that the price would have to be with certain safeguards with regard to the individuals.

With that authorization, the union officials met [358] with our negotiating committee because we were coming into a period then where the contract was about to expire. This was the first time in about ten years, because the contract up to that time had been allowed to be extended over each period of termination, so that we had a continuing relationship with arbitration in the event of dispute.

When we met with the union with this negotiation approach, and the union outlined to us their point of view and the proceedings they had had, and by way of digression they sent us a complete copy of the proceedings, so there was no secret about what the discussions had been or what the recommendations had been or what the proposals were that they intended to make to us; and following this preliminary meeting with the union it was my responsibility to negotiate, if you please, with the members of PMA, that is, the stevedores, the terminal operators and the steamship companies, as to whether or not they would be willing to negotiate a new type of labor bargain whereby the employers would concede that they would buy out the bad practices both under the contract and outside the contract for a price, whether they would gamble that the improvement that could result by greater efficiency and productivity on the docks would pay off as a labor bargain.

I can assure you there was considerable difficulty in convincing the employer group that this was the proper [359] procedure for bargaining. It was rather untraditional. The arguments were obviously, we believe that

we should pay a price for these changes, and the union agrees that we may make them. Our past record and the union's past record indicates that we would probably not have a delivery of the things that were promised.

However, by a series of rationalizations primarily based on the idea that, after all, we had been paying good money for bad performance of the years, that it might be worth while to take a look at paying the same money for a better performance and gamble on it, that we couldn't be any worse off, and with this ultimate decision by the steamship operators, including the foreign lines and the stevedores and the American flag group, I was authorized to advise the union that they wanted to bargain with them for a completely new type of labor contract, that we wanted to bargain with them for a contract which would wipe out the restrictive practices of the past, even the history that led to them, a contract which would allow us to operate efficiently without unnecessary manning and, in turn, for this type of negotiation, a contract, if we could reach it, that we were prepared in some fashion to share with them as employers in the industry a portion of the savings that would result to us if we could improve our operation and increase our productivity.

[360] Neither of us at that time, and the history that follows will illustrate this, had any specific notion of just how you would go about this thing, how you would accomplish it by way of contract change, and what the price would be that you would pay for it, and the measure of that price in relation to the industry.

It was about at this juncture, in order to clarify in some measure the new areas that we were about to invade, that this document that you are now referring to was prepared.

Q. This is a document which hasn't been admitted in evidence, and it is one of the few, I guess.

(Laughter.)

Mr. Ransom: Do you want to follow your practice of finding out if there is any objection?

Examiner Theeman: Let's go off the record.

(Discussion off the record.)

Examiner Theeman: On the record.

The Witness: Following the events I have described, it was specifically agreed with the ILWU and the PMA negotiating committee that we would carry on unofficial discussions to the end that we might arrive at a new type of contract, and because we were, neither of us, prepared to come to grips with the details of the situation, PMA prepared a draft document which outlined the understanding [361] as to the nature of the discussions and some of the background history, the references that we have talked about, such things as mechanization and automation, containerization, but that we were actually talking about something much broader than this, that we were talking about changes of traditional method of cargo handling with or without mechanization, but merely the change of bad practices in connection with normal cargo operations.

Then we endeavored to state, as the document indicates, the specific objectives that each side had in mind to achieve, and the things that the union in turn would want by way of guarantee on its side in the event that it agreed to the employer's objectives being accomplished.

This document that has been presented here as it indicates is the ILWU redraft of the document that we presented to them and, as I recall, the only changes that were made in the document were by the ILWU, and were minor changes in the listed objectives of the union.

We had no objection to the changes that they made, and this then became, though not signed, a part of the negotiating record before that period, and was the beginning of the long bargaining which continued from that time forward until we were able to conclude as we bargained on the subject of what is now referred to as mechanization and modernization on the 18th of October, 1960.

[362] Examiner Theeman: Excuse me just a moment. Without objection, the document just referred to as the ILWU redraft is admitted in evidence as Exhibit 54.

(The document above referred to was marked Exhibit No. 54 and was received in evidence.)

By Mr. Ransom:

Q. This document didn't call for any payment of money at that point? A. It did not. This, as I indicated, was simply to outline the philosophical areas that we were about to discuss and the practical things that we hoped to accomplish and, as you will note in the first paragraph, both sides agreed at this stage that this was an unofficial discussion.

Q. Would you then state when the first fund was established in connection with this program, and how much it was, and how it was established, and what was it supposed to accomplish? A. Well, I am trying to keep my years straight now. In 1959, we first established an arbitrary fund, an arbitrary amount of money, to the extent of a million and a half dollars, which was in effect a payment of earnest money.

Examiner Theeman: Did you say earnest money?

Mr. Ransom: Yes, sir.

Paul St. Sure—for Pacific, Intervenor—Direct

The Witness: Earnest money—to demonstrate to [363] the union that we were not just talking but seriously intended to reach a conclusion with them if we could find the method of doing it.

Prior to that time, prior to the 1959 agreement on this basis, and during the previous year, during 1958 discussions, we had talked at considerable length about wanting to pursue this idea, wanting to reach an agreement. We had undertaken abortively a number of attempts to establish various methods of measurement of productivity in the industry without success.

We were pretty much floundering for a way to reach an agreement. At the same time, changes were taking place in the industry, and the union was tightening up more and more in objection to these changes particularly, and again referring to the Matson operation where the union took the position that where containers were now beginning to move over the docks in number, that these containers, themselves amounted to a violation of the longshore agreement in that, one, they were either the farming out or subcontracting of longshoremen's work in that other people were loading the containers away from the docks; secondly, that if it was not a farming out of their work which was forbidden by the contract, that it was an attempt by the employer to evade the sling load limits; that is, the same cargo which otherwise would be subject to restrictions were being placed in [364] containers away from the dock, that this was not a true shipper's package load and, therefore, this was an evasion of the contract.

Other resistance had occurred in the past with regard to changes of the method of operation, for

example in the case of packaged lumber where a strike had stopped that operation, and where the union had gained a specific penalty pay of a dollar an hour permitting the employer to utilize the method that he wanted to use in handling cargo, and generally the pressures were tightening up day by day, by way of continued resistance on the part of the union to any contemplated changes, whether they were permitted by the contract or whether they weren't.

So when we came into the period of negotiation in 1959, and we in effect said to the union that we are still trying to devise a method of accomplishing these things, we are still trying to find a method of compensating you for the things we want back, they said in effect, that is fine. We have heard that conversation now for the last two years. Now it is about time for somebody to give us something more than conversation if you want us to permit you to even experiment in these areas.

And at that point we reached the conclusion that employers frequently are faced with, we might have to put some money on the line to be able to even continue [365] discussions.

I can recall that when I faced the employer group or negotiating committee and board of directors with this dilemma and told them that I thought that we should make some type of down payment, even though we had no formula yet devised for contract change, I was told that I was proposing that we bribe the union to permit the employer to do the kind of a job he was entitled to do, and I remember reporting this to the union negotiating committee, and I can recall Mr. Bridges' response saying, "Call it what you want. We don't mind. We are not thinskinned. So it is a bribe. But if you want to get the changes

that you are asking for, if you are going to take back from the men the things that they have achieved, whether up your spine or not, you are going to pay for it."

So it was on that ground or in that area that we decided that there was enough possibility in the ultimate total bargain to justify the payment of, as I say, earnest money or the demonstration of our sincerity which can usually be measured in business in dollars by making a substantial down payment.

By Mr. Ransom:

Q. Mr. St. Sure, at that time, in 1959, when that was made, was the contract open? Were you also negotiating wages and increases in wages, fringe benefits, welfare plans, or [366] were you only talking about this? A. No, by this time this was a part of the total review; I mean at the annual period under our contract the union gives notice of its demands, and the employer in turn gives notice of his demands, if he has any, and the employers under normal conditions, except for the period of expired contract, as there was I believe in '58, where the contract continues, the review is during the course of the contract.

Negotiations go on for a period of 15 days. In the event there is no agreement reached at the end of 15 days, automatically all issues go into arbitration, and the arbitrator is required to make his decision within 15 days thereafter by a specified date to avoid the problem of retroactivity in this complicated industry, so we were at a period in 1959 of a general contract review, and one of the specific items for review was the question of mechanization, automation, what have you, plus wages, plus fringe demands, plus welfare, plus everything else, so it was part in 1959 of the total negotiation.

It was merely one item of a list that the union presented. We resolved that item by putting it aside in the sense that we did not reach a definitive agreement as to contract change. We did, however, propose to the union in our first offer that we would make a payment into a [367] jointly trusteed fund of $1 million, in return for which the union would, one, concede that we were in good faith in pursuing our negotiations in this area in the future; two, that they would agree that this would be a payment for whatever changes had occurred up to that time, so that we wouldn't have to be reaching back to price out earlier changes, some of which had occurred already, and, third, that we would be allowed to continue experimentation provided that we would in effect freeze all of the existing bad practices, at least for the period of the year, that we would not seek to undo some of the things that we said we ultimately wanted to buy out.

I can remember when the million-dollar figure was presented, Mr. Bridges, who was the sole spokesman for his negotiating committee, which is an elected committee, inquired of me, "Where did you get the million dollars?"

And I told him that it had no relation to any measurement of saving or any formula that we had been able to devise, but that we did believe that the pressure from the unions who reversed the whole trend again, and to repudiate the possibility of future agreement, required us to make some demonstration of our good faith, and we felt that this could only be done by naming a substantial sum of money, but inasmuch as we had a payroll of $125 million for longshore operations on the coast, the million dollars sounded to us [368] to be a substantial sum. It was a nice round set of figures, and that this is where we got the million dollars.

He said that they would consider it and would meet with us the following day, I believe, and when we met the following day he said, "Our price is a million and a half."

I said, "Where did you get the million and a half?"
And he said, "The same place you got the million."
So that is how we arrived at the figure of the 1959 fund.

(Laughter.)

Mr. Ransom: It is 12:15.

Examiner Theeman: Is this a good time for you to break?

Mr. Ransom: Yes, sir.

Examiner Theeman: We will recess until 2:00 o'clock.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m., the same day.)

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[369] Afternoon Session 2:00 p.m.

Examiner Theeman: On the record.

Would you read back the last couple of sentences, please.

(Record read.)

Whereupon, PAUL ST. SURE resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Direct examination by Mr. Ransom: (*Resumed.*)

Q. Mr. St. Sure, that million and a half was in the June 1959 negotiations period, wasn't it? A. That is right.

Q. And I think you stated this morning that agreement had been reached in '58, and in '59 it was merely a matter

of arbitration. Do you wish to make any correction of that statement? A. Yes, I think that I was confused as to the sequence of years. The '58-'59 situation—actually, the contract which would have expired as of June '59, actually we were negotiating in '59 against the possibility of strike for the first time in a good many years because we had previously had this practice of extending the contract always a year or [370] two beyond the actual expiration date.

Q. Was the matter of the million and a half an issue which involved the possibility of a strike? A. It involved the possibility of a strike in either one of two areas, either that we would be paying more money with no chance of improving the contract conditions under the union pressure to not only continue, but expand these resistances, or if we insisted that there be some improvement in the contract by way of removing restrictions and bad practices without having paid a price for it, I am sure that we would have gotten a strike in either area.

Q. Was there a memorandum of understanding resulting from the June '59 negotiations? A. Yes, there was.

Q. I will ask you if you can identify Exhibit 1-A as being that memorandum of understanding. A. Yes, sir.

Q. Did that call for a review, then, in 1960 of wages, mech fund, and welfare plans, and what-not? A. Yes. In addition to avoiding the strike possibility and arriving at the quid pro quo, I mentioned about the buying out the past changes, and freezing the restrictions for the period until the next negotiation, we were able to buy a three-year contract at that time, that was extending the period of the contract over the period of the [371] next three years with the usual provision for the review on the anniversary date in June, and one of the things that was then subject to review was specifically the matter of wages and, of course, the mech fund or mechanization, and the other issues that were subject to review under the memorandum that we signed at that time.

Q. Then you attempted again in 1960 to work out if possible some arrangement which ultimately resulted in the present modernization and mechanization fund plan, is that right? A. That is correct. My recollection is that the union presented four issues for review in 1960: wages, I am sure, mechanization fund, I am sure, and either welfare or pensions, but there were other issues, but the principal ones were the issues of wages and so-called mechanization program.

Q. Did you actually reach an agreement by June 15th then, of 1960, on all of those matters? A. No, we did not.

Q. What happened? A. At the beginning of the negotiating period—and I stated this morning by contract we were now in a three-year term with the usual provision for review and arbitration which permitted 15 days of negotiation, and then the automatic reference to arbitration, and when the meetings first began that year, the ILWU took the position that they [372] assumed that they were not ready to bargain to a conclusion to the mechanization issue, and I may say parenthetically that during the period of the year that intervened we had continuing informal discussions with the ILWU.

They knew that we were probing for productivity measurements, and that we were having problems within our own group, so the suggestion that was made by Bridges at that time was that, inasmuch as we were not ready to proceed, the union was prepared to set aside the mechanization issue for another year and bargain only on the remaining issues of wages and other fringes provided we would pay this year $3 million, and again the colloquy of where did you get the three; well, it is just twice one and a half—(laughter)—and we told them that we were not prepared again to pay a sum of money arbitrarily, and we were prepared to negotiate the problem of the mechanization fund and the contract changes during the

then pending negotiation, and that we would not pay any further arbitrary fund really for the purpose of buying time.

We then proceeded to negotiate or attempt to. Both sides realized that there were many detailed items of discussion to be worked out that could not be worked out in a period of 15 days.

Candidly, neither side wanted to risk going to an arbitrator for this determination of this issue that was [373] so complicated that we couldn't develop it, much less leave it in the hands of a third party.

So, in effect, we stopped the clock as against the automatic provision for going to arbitration and continued to negotiate until finally an agreement was reached on the 18th of October.

Q. And that agreement was that which is set forth in this memorandum agreement of Exhibit 1-B, is it? A. That is correct.

Q. And roughly, very briefly, what does that agreement consist of as to the wages, welfare, mech fund, the broad outline? A. The basic wage adjustment, as I recall, was eight cents an hour. There was a formula based on passed negotiation that relates that eight cents an hour which is eight cents on a six-hour straight-time day, to a greater sum for clerks who work on an eight-hour straight-time day.

I think that figure was ten and a half cents an hour, to equate with the eight cents an hour. In other words, this is an internal formula. The two normal straight time days, which are artificial to be sure, also do bear a relationship in take-home pay, so this adjustment was paid in wages.

There was likewise an adjustment made in the welfare, I believe, by increasing the contributions to the [374] welfare fund, and there was a detailed agreement with regard

to so-called modernization and mechanization fund, or work practice fund, and it had a variety of names during the negotiation.

Q. Was this all one package, then, these various items? A. Yes, these issues were all issues in the single negotiation and were all part of the review that was conducted at that time.

Q. During the course of negotiations, was any consideration given to—instead of creating a fund, simply giving an additional wage increase which would buy what the mech fund was to buy? A. Well, there was consideration given to it, both from the point of view of the employer's philosophy of this, all added up to a wage cost package in whatever form it was ultimately agreed to. The union, however, took the position during the course of these negotiations that, inasmuch as we were interested in buying out work restrictions, this could not be done on the basis of a mere wage increase.

I recall specifically that Bridges made the statement with regard to the sling load limit alone, that if we wanted to offer a dollar an hour we couldn't buy out that restriction on the basis of a wage increase. It would have to be done in some other form. It would have to be done in [375] the form of providing a protection against the loss of work opportunity which they believed and which we wished would result from the revision of the agreement.

Q. If instead of five millian per year that would be converted into a wage increase, have you any idea what that would amount to? A. At a dollar an hour, it would have amounted to $25 million on that one item alone.

Q. My question related to the five million that was finally agreed to. If that had been converted into a wage increase, how much of a wage increase would that have been? A. Eighteen, 19 cents an hour, possibly.

Q. In addition to the eight cents? A. Yes, sir.

Paul St. Sure—for Pacific, Intervenor—Direct

Q. Will you state what in your opinion the mech fund then did buy for the employers? A. Well, I think the simplest statement is the language now contained in the contract itself, as well as in the memorandum upon which it is based, that the employer would be entitled to operate efficiently, that he could change method of work, he could utilize labor saving devices, and that he need not be required or expected to employ unnecessary men.

Now, this specifically meant, by way of change, if I may singleout one individual item of restriction, it meant the elimination first of a practice known as multiple [376] handling of cargo in many ports.

It meant the elimination of the sling load limit that had been imposed upon non-listed cargoes by job action. It meant the elimination of the sling load limit, as such, in situations where either men or machines were added to move the larger loads. It meant the elimination of frozen manning in various operations.

For example, as the change had come in years past from handling grain or sugar in sacks to so-called bulk operations, the machinery had been added and, whereas no more than two or three men would be required to manage the operation of loading bulk sugar, we were still settled with 20 or 30 men, the same number of men that used to handle the sugar or grain when it was in sacks.

It meant that we could eliminate that type of featherbedding, and I can cite many other examples of a similar nature.

It meant that in any operation that we could introduce that the employer would be the judge of how many men were to be placed on the job. In the opposite situation, where an existing operation was unchanged, we had the right to request a reduction; in the event the union agreed the reduction was made. In the event the union disagreed we went to arbitration.

In the reverse situation of the new operation, the [377] union had the opposite right. If they challenged our number of men, they had the right to appeal and go to arbitration, but we could initiate the number of men in the new operation. It means that wherever there were restrictive provisions in the contract, they were no longer frozen. It meant that a specific procedure was devised for the correction of any restrictive existing measures, any excess manning, and essentially that we could operate efficiently without featherbedding on the job and without work restrictions.

Q. Did it include the opportunity for technological advances in the industry which did not exist before? A. Yes. As I say, specifically, in addition to the removal of work restrictions and featherbedding, as such, I should say in this industry the term is not featherbedding. They are referred to as "witnesses." (Laughter.)

And it did mean the removal of witnesses in those operations where they existed.

With regard to new methods, the introduction of machinery, as distinguished from a normal or traditional operation, conventional operation of handling cargo, it meant that we had the right and specific agreement that we could introduce new devices, new machines, new types of vessels, whatever, in this area that we might contrive without union resistance and indeed with the right to determine initially on the employer's side how many men should be [378] required to operate such a new device or new operation.

This did result and has resulted in some rather dramatic changes in operation on this coast which have come to us automatically.

Q. Did you also buy the right to continue any improvements that had resulted since the 1957 memo? A. That is correct; changes that had taken place, for example, in the packaged lumber operation which had been subject to chal-

lenge were both bought out, one by the million and a half dollars, combining down payment, and this was reaffirmed in the ultimate agreement on October 18th, 1960, that these changes that had occurred were no longer and could no longer be claimed as a violation of any part of the old agreement or the new agreement by the union and, in effect, were bought out.

Q. Did the contract terms change at this time when you completed your agreement in October of 1960? A. Yes, very definitely this was tied in to part of the total bargain. Up to this time, we had never had a contract for a longer term than three years. The ultimate bargain on the mechanization fund or modernization fund by its specific terms extended over a period of five or five and a half years.

We insisted that, since this was part of the total bargaining package, and since it was an issue in the [379] contractual discussion that it had to be a part of, and of the same term as the bargaining agreement of which it was a part, and that the contract basically, therefore, should run for the same term of the years that the period of the mech fund was to cover, and indeed the extra six months was tacked on because there was another expiration date of a pension program which had been separate from the contract by way of separate agreement, and so as a part of the ultimate deal on the 18th of October, the basic contract, including the mechanization program, was tied down for a period until 1966, extending over a period of more than five years, which was a part of the bargain, also.

Q. And during that five years, the union's right to strike would be by reason of the extended contract restricted, is that right? A. That is correct.

Q. Did the agreement require—that was reached in October—did that require ratification, then, by the union and by the PMA? A. It did.

Q. And it was ratified by the PMA when? A. Early in January of 1961.

Q. Under that plan, as finally negotiated, who was it that was to determine the method of collecting the five mililon per year? [380] A. Well, PMA during the negotiations insisted that PMA would have to determine the method of collection, although this was a subject of negotiation during the course of the negotiating period.

Q. Were the negotiations on the issue—

> Examiner Theeman: Is this the interpretation of Mr. St. Sure on the agreement, or is this what the agreement was, because I am sure the contract will speak for itself, Mr. Ransom.
>
> Mr. Ransom: I am not sure I understand.
>
> Examiner Theeman: What is the purport of your questions now to Mr. St. Sure?
>
> Mr. Ransom: The purport of my question now was simply what was the result of the negotiations, and I think he answered.
>
> The Witness: Well, I think—
>
> Mr. Ransom: Excuse me, Mr. St. Sure.
>
> The Witness: Pardon.

By Mr. Ransom:

Q. I think you did answer that, and my next question to you is, to what extent was the matter of the determination as to who was to pay the fund and how it was to be arrived at, to what extent was that part of the negotiations with the union? A. It was a definite part of the negotiations in that [381] the union took a position with regard to the method of collection. PMA took a position with regard to the method of collection. There were discussions with the union during negotiation as to the problems that had been

presented by the method of collection used with relation to the million dollars and a half.

We discussed with the union the differences of opinion among our own members as to the equitable method of providing for the collection of this money.

We ended up with an agreement by the union that, inasmuch as the employer members of the bargaining unit had committed themselves specifically to the payment of the sum, that whereas they were interested in the assurance that the sum would be collected, they would allow us to work out among ourselves the method of actual collection within the membership of PMA.

Q. For example, was a productivity method discussed in your negotiations? Was a tonnage method discussed? Was a wage and hour method? Were these various methods discussed in these negotiations with the union? A. Yes, sir. If I may go back a little, the initial million dollars and a half was a commitment by the PMA members to pay that amount of money to the union, and at that time the union had definite ideas of how it proposed to spend it, which they later changed.

[382] That money was collected on a manhour basis, and because the question was raised within PMA membership as to the validity of this approach, the position was taken by many of our members, including those who said they didn't contemplate mechanizing, that this was in the reverse position, and actually that there should be a relationship as between any fund that might be in the future contemplated, and the actual saving of manhours that might result to an individual employer.

Our first discussions with the union during the 1960 period were on the basis of attempting to arrive at a formula which would measure productivity as such and would relate savings or relate payments to manhours saved.

We had done a good deal of experimentation, and investigation, and study in this area, and from our own point of view as employer had rejected this approach on two grounds at least. The most practical reason for rejecting it was that it was found rather quickly to be an attempt to measure operation by operation productivity on a particular type of cargo or operation, so complicated by such things as weather, type of vessel, type of pier, congestion in the area, a particular crew that might be working on the job, and a variety of other things, that the fact that we had some five or six hundred cargo items to deal with as well as vessels of all types, that this would be a statistically impossible [383] thing to accomplish, and the second reason was that the employers were fearful that the measure, if the measure were provided in this fashion, that if we achieved the ultimate of arriving at a minimum number of men on the job handling a maximum amount of tonnage, that the fund would become kind of a monstrosity; I mean you would have the last man club we were talking about who would be pushing the final button, and yet you would be relating a fund to 30 million tons of cargo, and you would be building up a great fund which would not have any relation to anything in particular which was left on the job, and there were serious discussions by employer groups, not only on this coast but from other areas which led to the rejection of this type of direct measurement paying into the fund because the conclusion was reached that what we were doing was not establishing something forever, but we were buying out over a phasing period certain contractual restrictions that we would pay a price for and be done with it, and then face the next bargain.

So this was discussed with the union as part of the negotiations, and we told them our reasons for abandoning this approach.

This union then proposed first a direct approach that for every man hour saved, regardless of how it might be saved, whether by way of better supervision or better facilities or better discipline, or by the introduction of [384] machinery, that we should pay into the fund one straight time hour of wages, their reason being that our fringe costs were so high that we would be making a substantial saving in fringes and lack of overtime, welfare, and pension payments, and that we probably could avoid the tax upon this money that would go into the fund, and we rejected that as being too arbitrary and too obvious a measure which we thought likewise would have problems of reporting and relating.

The union then took the position that we should collect the fund by a tonnage tax, and I think I should comment on that, if I may.

In looking over the report of Mr. Teige's committee, the majority report, I note it states that the union did not request a tonnage assessment.

Q. You are referring to what we call Exhibit 5-A— A. I think—

Mr. Torre: And B.

By Mr. Ransom:

Q. 5-A and B? A. Well, on page 6 of that document, as I remember it, there is a single statement that the union—"This is particularly true since the union has never urged a tonnage formula as a means of paying for the fund."

The members of the majority group of that committee had not been on the negotiating committee. They were [385] appointed by the negotiating committee for a particular tax, and this is simply based upon wrong information or lack of information.

Paul St. Sure—for Pacific, Intervenor—Direct

The union did insist—particularly Mr. Goldblat, who was the secretary-treasurer of the union—that not only should the mechanization fund be based upon a tonnage assessment, but that all fringe benefits under the contract should be converted to a tonnage assessment, and this was the subject of very considerable discussion during the negotiation period.

Indeed, at one of the meetings—I think the ninth—we had some 40. We had Bridges himself proposed a formula in which he proposed that we apply a 29½-cent tonnage tax on all tonnage as the method of raising the fund that we were negotiating for. We rejected the proposal of the union that we agree to the method of collection on the ground that primarily we were fearful that if by contract we agreed to a tonnage tax, that this would become a contractual formula which would persist beyond the five-year term, and that we would find ourselves discharging cargo or the commodities we were handling, and we stuck with this as a principle for the future.

We rejected it both as to the conversion of our other fringe benefits to a tonnage tax, and we rejected it as a contractual basis for raising the money for the [386] mechanization fund, and we specifically told the union why we were rejecting it, and that we would commit ourselves jointly, and severally, to the raising of this money, but that we insisted that it was a matter within PMA to meet its contractual obligation as a part of this bargaining process that we had been going through, and that we might adopt a tonnage tax measure; we might adopt a manhour measure. We might adopt a combination of those, or we might find some other method of doing it, but that this we were going to reserve as a part of the implementation of this bargain that we had made.

Q. As part of the negotiations, the union did finally agree to what you were insisting on in determining the

mech fund? A. They did agree on the basis of assuming our obligations that the monies would be forthcoming.

Q. Mr. St. Sure, once that agreement was reached with the union, was the situation that the union lost all interest in the method of collection? A. No.

Q. Or would you say there was a continuing interest? A. There was a continuing interest and a continuing concern as to whether or not the collections under the fund were being met. Obviously they have, by joint trusteeship, joint custody of the fund, and I can assure you that they [387] were alert as to whether or not the method of the custody, was working, because they believed this and, in fact, knew it was their money to spend in accordance with the agreement.

One of the reasons in connection with rejecting the union, on the East Coast, a similar situation had arisen with the ILWU on the Port of New York previous to the last strike with the same issue which is now being reviewed by the Undersecretary of Labor, and unresolved, and the union there took the position that any containerized cargo —and they singled out that particular item—should be assessed a penalty merely for the fact that it came in in a container, and the operators on this coast believed that this was a dangerous principle to single out individual cargoes, and say, "This will be taxed by the union for a particular purpose."

As in the case of Mr. Hopper's deal with the piggyback, five dollars for each container that goes aboard a truck, and so forth, the feeling here—right or wrong—was that this was an industry problem involving a total cost package, and that it should not be aimed at particular cargo movement.

Indeed, it was an obligation of the employers, as a group, to provide a total operation which would be available to all employers.

[388] Q. Supposing that the PMA had adopted a system that, let's say, would result in abolishing whole segments of the industry, what would you think would have then been the union reaction? A. I am quite sure that if any agreement had been reached which would have brought about such a result, we would have an obligation, and I am sure the union would insist upon it, to reopen the bargaining and to resume the bargaining as to the means by which the funds were to be collected.

After all, this was a continuing relationship that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations.

Q. In your negotiations with the union on this M&M plan, was it a principal object of the employers to have all assessments of the industry, the stevedores, the carriers, the terminals, and various segments of cargo, all come out even without any advantages or disadvantages? A. No, this is something that is—whether this industry or any other that I know about—an impossible refinement to achieve. What this contract provides, and so described to our membership, is a blueprint which will give equal opportunity to those who work under it, and by that [389] I mean the employers who were bound by it, to operate efficiently, to make changes if they desired to, and to receive the benefits of the new agreement which eliminates work restrictions and so forth.

To this degree, the employers themselves may have control over what they can accomplish. It is obvious that investment of capital by one employer may produce a greater result of labor savings than would be available to the employer who didn't invest capital in new machinery, equipment or vessels. Indeed, this is one of the arguments

that the foreign lines raised in the initial mechanization discussions, that they didn't contemplate mechanizing. The converse argument was that there was something in this for everybody.

There were things that had nothing to do with mechanizing. It had to do with work restrictions, but even the things that were available for mechanization were equally available to all employers to work under this agreement if they chose to operate in this fashion.

The matter of equal effect or impact on employers in a multiple employer group, I think obviously you don't get equal results.

In the canning industry, we have certain products that are so perishable they must be packed every day and processed the day they arrive, and yet a contract will [390] provide that Saturday and Sunday work will be at overtime, and the man who packs asparagus or peas, for example, must be paid overtime because he is an around-the-clock operation, in a sense.

Well, the other employer can avoid this type of penalty.

In our own operation during the 1958 negotiations, I believe we negotiated or agreed to an eight-hour guarantee for any longshoreman who was turned to as against the standard four-hour guarantee.

Our concern was in that negotiation that we would be guaranteed dead time; that is, there would be situations in which there wouldn't be work available. They might have a half a day's work and no more. We were likewise concerned with the fact that the inducement to guarantee the eight-hour day offered us by the union was that we could avoid specialization.

We had reached the ridiculous situation on this waterfront that a man working on the dock who was called in to palletize cargo, if he was asked to depalletize it would say, "Look, I was hired to palletize. I will pull it on the board, but I won't take it off."

The shipping clerk would check out merchandise but he wouldn't check merchandise coming on the dock. He would say, "I am not a receiving clerk. I am a shipping [391] clerk," and I could suggest many other examples of his kind of tonnage specialization.

The clerks in that year came in with a request for 23 separate classifications of clerical work on what they call a chain of command. In order to bargain with the union, which was part of this bargaining process, for something that they wanted, which was the eight-hour guarantee, we said we will gamble with you provided you will wipe out all specialization on the docks.

A longshoreman is a longshoreman, and a clerk is a clerk. We reached an agreement that they would wipe out specialization, except that a man who was a skilled man or a skilled driver or a winch driver wouldn't be required to go down and handle cargo in the hold.

We likewise bought out what were known as the year priority limitations which was a restricted practice to prevent alleged discrimination.

We likewise bought something we had never had on this coast, the right not only to transfer men from ship to ship, dock to dock, and from company to company; we felt by getting this flexibility we would wipe out in large measure having to pay for dead time and would gain something.

In three months we ran a check of the actual result of that. Many of the objections from the employer's point of view were that this would result in an uneconomical [392] impact upon members of the industry.

We found after three months study, that actually the result from our point of view overall was a desirable one. However, it did occur that in a number of situations individual ships, individual cargoes were penalized, but the industry as a whole gained a tremendous benefit.

So there was no exact equality of results, but the overall result was one that the industry bargained well for in our judgment.

Q. Mr. St. Sure, from your experience, do you know of other situations in other industries where a fringe benefit plan has been negotiated with the union and the method of raising this fund to take care of that fringe benefit was in the negotiations reserved to the employers? A. Well, the most nearest parallel that I can think of, and I have represented department store groups in the joint bargaining, and the same thing has occurred I think in the milk industry where in bargaining for a welfare plan or a pension plan where you put a group of employers into a single package, and you have one employer who has been in business for ten years and one who has been in business 50 years, you necessarily have a different experience rating based upon the age group in the separate plants.

An old employer may have a work force which is an average of 50, and the new employer may have an average [393] cost of providing a hundred pensions, for example. These costs are quite different. The same is true with regard to welfare plans where age or sex will make a difference in the experience rating of a particular welfare item.

In these situations it is frequently done, and I have negotiated agreements where the employer agrees to guarantee a set of benefits and says to the union, "We are not going to tell you what the contribution is. We are going to provide within ourselves the method of providing the premium or the money required."

And then the employers themselves literally divide amongst themselves on an equitable basis how this money should be raised, which is not a part of the union contract.

The contract is to provide the benefit.

Q. After the agreement of October 18 was reached, then how was it that you went about determining the method of raising funds? A. Well, during the course of negotiation, because of a division within our ovn membership, I made the commitment to the foreign lire group, particularly, as well as to others not in the foreign group, that prior to ratification of the October 18th agreement, the method of collecting the money would be worked out internally within PMA and presented to our membership prior to ratification, so they would ratify both the October 18th memorandum and the method of collection at the same time.

[394] In order to accomplish this internal determination as a part of the ultimate bargain, the Coast Steering Committee, which is and was the negotiating group, named a subcommittee which is the Peter Teige Committee, and instructed that committee to consider the question of a method of collection, having in mind the various arguments that had been going on within the membership of PMA to make a recommendation which could be presented to the board of directors by the first of the year, and that in turn then presented to the membership of PMA for ratification.

Q. Was the fact that the Coast Steering Committee was a negotiating committee, did that fact have any bearing on why it was appointed as it was? A. Well, this was still part of the bargaining process. We were still actually trying to conclude the bargain which we had developed and had signed a memorandum to cover. We still had the responsibility as a negotiating committee of reporting back to the board of directors, and then to the membership, and this was simply a convenient means of calling in some men that we felt were more expert in this field than the negotiators were who were operating people to make a recommendation as to a method of payment.

Q. And that committtee did finally adopt a system of tonnage assessments? A. It did.

[395] Q. And that was ratified by the Steering Committee and by the board of directors and by the membership? A. That is correct.

Q. Subsequently, there was a change at some later period to include marine clerks? A. Yes, there was.

Q. Was there a precedent within the PMA machinery for contributions or assessments on a tonnage basis? A. Yes, for many years before my coming in to PMA there had been assessments for various purposes. As I say, we are a non-profit organization, and the assessments are to pay the operating costs of such organization and other things within the organization which are part of the collective bargaining agreement.

For instance, joint maintenance of the dispatch halls up and down the coast, some three-quarters of a million dollars a year goes to this operation, and the method of rating, both PMA fund as well as to meet such obligations under the contract, as the dispatch hall cost and the cost of paying arbitrators' salaries, and things of this kind which are jointly borne, has been assessed on the basis of tonnage.

Q. There has been a great deal of testimony in this case so far, Mr. St. Sure, on the method by which these tonnage dues, as well as the mech fund, are based, whether on [396] a weight or a measurement ton, and particularly as respects automobiles.

Can you state, if you will, how that method was determined for tonnage dues, as well as the mech fund? A. Well, the mech fund method was simply adoption of the method that had been in operation for many years for the same purposes and other purposes I have mentioned, and this was based upon the custom and practice of the maritime industry, and the tonnage assessment was based upon revenue tons.

That is, however the cargo was manifested or freighted, and this being the accepted method within the industry competitively and otherwise for manifesting freight, this was the measure adopted in providing the PMA assessments.

On the basis of the industry itself having arrived at this method, therefore, we adopted it.

Q. And specifically as to automobiles, do you know how it was determined that they would be assessed on a measurement basis? A. So far as the automobile situation is concerned, with regard to off-shore or ocean operations, the practice of the industry as far back as memory seems to be in our organization, at least, is that the automobiles have been manifested on a measurement basis in these trades.

[397] The only situation that I can recall where this was even brought into question was at one time where somebody felt, well, maybe by reason of tonnage assessments in other areas, that somebody could get cute and could convert from measurement to weight and thereby save the assessment for normal association purposes, but as a matter of precaution our treasurer did send out a notice to all our members that automobiles as such had been customarily manifested on a measurement basis, and that we expected them to continue to report and pay assessments for automobiles on this basis.

But this, as I say, rested upon what I understand to be the custom and practice of the industry.

Q. Where any attempt is made by the PMA to assess on a weight or a measurement basis in one particular way, if it were not the custom and practice in the industry what would happen? A. Well, I think we would immediately have it called to our attention, and I think if there were any variation from the industry custom and practice which varied from the practice that competitively we would hear about it pretty quickly.

Q. Then under the agreement, who was to pay the contributions? A. The stevedore or the district employer of longshore labor.

[398] Q. Did you consider that only the stevedores and the terminal companies would be expected to get benefits out of this, or would you expect there also would be some benefits to carriers, or both? A. Well, the whole purpose of the agreement was to improve the efficiency of longshore operations which in turn means to reduce the cost of handling cargo and provide a more efficient operation which, in turn, relates to the faster turnaround time of ships.

We expected to reduce our direct labor costs, both on the average and in detail. By that I mean direct labor costs that the stevedore or the terminal operator had to pay out by having less manhours to pay for.

We likewise expected that, if there was a saving, that this would have some direct benefit to his stevedore and his relationship to his customer as to whatever bargain he made with them, and we assumed, also, that the carriers would probably be aware of the fact that savings were being made, and might sharpen up their pencils in bargaining with the stevedore.

It was ultimately possible, I suppose, that the shippers would get some benefits from this, too, but this was not a matter that we were specifically concerned with, except as a by-product that might flow from having a more efficient operation.

[399] Q. Did you and PMA or your staff inquire into or have knowledge as to how the stevedores themselves raised the fund, whether they passed it on, or whether they absorbed it in part or in whole, or what? A. We have no knowledge as to how this was accomplished, and I heard testimony this morning about what some of the arrangements may be betwen the stevedore and his customers, or

between the steamship lines and the stevedore. We do not know. We have not been able to inquire into what these arrangements are. These are essentially bargains made between the stevedore and the direct employer and the terminal or the steamship line or the carrier, or whatever other customers he may have.

We know that by general experience of the industry, there are arrangements which are cost-plus arrangements. We know that more and more there is a tendency now to go back to the commodity type arrangements. We know that there are certain tariffs involved and certain freight rates involved, but these are not matters of our concern, nor are we allowed to be concerned with them by the people we represent.

Q. Did you in this negotiation or in working out this plan consider it as another labor cost or as some kind of a rate on cargo? A. This is part of the total cost package for the employment of stevedores or the employment of longshoremen [400] and marine clerks under a collective bargaining agreement. We regard it from the point of view of the bargaining responsibility we have as no different a cost than the payment of a fee into a pension fund or into a welfare fund or some other fringe benefit, except that in this situation we felt that we were getting something in return for our money rather than a mere added cost.

Q. The plan has been in operation now for a little more than two years. Will you state how the plan is working out? A. Well, the plan officially was put into operation early in 1961. We had an understanding with the union that we were trying to reverse 25 years of practice. We were going to change what the union people referred to as the tribal rights.

We were going to eliminate double handling of cargo. We were going to move larger loads. We were going to

eliminate men and do many things that had been going on in the reverse direction.

We also had the problem that we were treading on the toes of the Teamsters Union and had been party to the other part of this double handling, and we had some jurisdictional problems that we weren't too sure we could work out.

We agreed that we would approach it gradually on a step by step basis, and during the period of 1961 we began [401] to phase in these changes, and we are still in the process of doing this. We haven't completed the total operation to our satisfaction as of now, so you can scarcely say we have had a full year even.

In '61, we had a partial operation under the plan, and we are still proceeding under the plan, but by reason of a controversial productivity measure that we have attempted for the first time in this industry, establishing a base measurement for productivity in various ports and for various commodities on the Coast which was established for us by Dr. Kossoris; we have a comparison for the year '61 against the base year of 1960, which indicates that there has been something over a million man hours saved during the period of comparison.

This is not entirely accredited to our judgment, the mechanization fund, as such. It probably has partially to do with the tightening up of decline. It probably has to do with this eight-hour guarantee inflexibility, but the net result is that we have reversed the trend.

We have some rough comparisons without detailed comparisons which we are still attempting to make of '62 as against '61, which do demonstrate that by going back to the year 1958 and comparing the total picture in '62, whether by reason of this fund operation which we think is largely responsible for the additional factors I have mentioned, [402] we have been able to absorb all of the rates

that were made for the period 1958 until 1962, and still handle the same amount of tonnage.

We think that this is a rather remarkable result in any industry in these days and these times. We think a large portion of it is the result of the mechanization plan, and the change in attitude that has been accomplished as a result of the application of this plan.

In addition to that, to add a further comment to how it is working, we anticipated that the attrition of the work force under the employment which was frozen as a result of our experience under our pension plan would amount to about four per cent a year.

We felt that this would largely compensate for the reduced manhours without penalizing the man that remained on the job by too little work opportunity.

We found that by reason of the benefits that were built into the plan by the union by use of this $5 million that we have, three of which go to provide for retirement bentfits, and a reverse kind of severance—what they call a vesting severance—which they can take with them when they leave the industry, and life insurance provisions, the balance goes to a guarantee of work falling not below 13 hours of pay.

These inducements have actually stepped up or did [403] step up the attrition rate to some nine per cent instead of four, and we have now actually registered additional men into the work force, so even from the point of view of social accomplishment we might have accomplished something.

Q. Mr. St. Sure, supposing that pre-1957 a new mechanical device would be introduced by a stevedore company, and assume further that that device did not actually change the number of men required to do the job. What would be your view as to the acceptance of such a new device pre-1957 and today by the union? A. Well, I am not sure

I understand. I can give you several situations. We had the packaged lumber situation which initially brought a strike and a specific penalty on permitting that particular operation to continue as an exception.

We had in the situation with the change from sack handling of cargoes to bulk where machines were introduced, and the type of vessels were introduced, but we still had to employ the same number of men. They refused to recognize that the machine or the adjustment led to labor savings, so we got the witnesses.

We had 18 men on the payrolls that did not work, but there they were. We had situations such as the Matson Hawaiian Citizen which not only caused union resistance, but we had a tie-up for ten days in the Port of Los Angeles, [404] simply by reason of fighting the machine or fighting the change.

Following the mechanization agreement, such vessels as the Zellerbach vessels which are now making amazing records of cargo loading on this Coast of newspaper printing, now, not only have they been operating but operating with a number of men the employer said should be on the job and no more, and this wouldn't have been possible prior to the execution of this agreement.

We were on our way to arbitration with the alleged violation of the agreement in the Matson situation in Los Angeles, and we were constantly finding resistance to the removal of men from gangs, and I can tell you now in the readjustment of gang situations alone we have not had an arbitration on this coast.

And we have not had a union challenge that has gone to arbitration on this agreement. These things wouldn't have been possible before.

Q. Well, would there have been resistance before to some new sling, some new method of loading, which didn't appear one way or the other, that it was going to reduce

the labor, but simply was a new device? A. Well, we had situations that weren't even a new device. The pallet board is perhaps the simplest example that I can give you. In some local unions, including the [405] one in San Francisco, the union unilaterally determined the dimension of the pallet board that they would utilize. They had to have so many boards, and they had to be yea thick, and they had to be of certain dimensions.

My recollection is that the Army, which is a very large shipper of cargo in this port, actually procured a board which they felt could be produced or procured more cheaply than the ones the union had elected to approve, and some thousands of these boards were actually built, and not one of them was used. The union would not touch them until after this agreement was put into effect, and those boards are now in use.

They were safe boards, but the union simply resisted anything which the employer introduced, which was not to their particular unilateral liking.

Q. Are you acquainted with the improvement or lack of improvement by Matson in loading automobiles? A. I have some general knowledge about it.

Q. Do you for example have any knowledge as to the number of man hours or the cost of loading automobiles by Matson pre-mechanization and post-mechanization? A. I specifically asked the Matson people when the Hawaiian Fisherman, which is now the Hawaiian Motorist, was put into operation. My recollection is the figures they gave me that their cost of loading an automobile by [406] conventional methods on a Matson freighter ran around $12 per car.

On the first voyage of the Motorist, I was told that the cost was reduced to $4 per car.

In addition to that, not only of the mechanism which was introduced for loading, they of course did provide

a converted type vessel to handle the cars almost on a parking lot basis.

In addition to the handling cost, of course, the ability to bring in this type of operation which was a combined mechanizing of the loading equipment, the conversion of the vessel, and the use of the automobile, it has a mechanical device to stow; whereas it would take five days at a minimum to load a vessel with automobiles by conventional methods, the Hawaiian Motorist now turns around at each end of the line in less than 18 hours, and the number of men involved would be less than a conventional gang as against five conventional gangs with five days as a comparison.

Q. Has there been a reduction in what is called slowdown or work stoppages since this mech fund has gone into effect? A. Well, ten years ago our daily record was one of work stoppages in every port. I would doubt that during the last year we have had three work stoppages on the entire [407] coast and by that I mean job action.

This has disappeared. I think it is largely a combination of many of the things we have been talking about, but a specific part of the elimination of work stoppages or job action is a direct result of the mechanization fund by-product, let's say.

One of the provisions of the October 18th agreement was a guarantee by the employer that the new operation would not be onerous, and I stress that word because it was a very high point of the negotiations.

Mr. Bridges himself dug this word up out of the dictionary, and we had a Webster's dictionary in the bargaining session while we were negotiating, and he looked up just what this word meant, but the real danger of the renewal of work stoppage under this agreement was the resistance of the men to things that might be new, and this onerous thing could well provide a new method of resistance and work stoppage.

We reached the question, if any question of onerousness would be raised, the union officials who negotiated the agreement said, "Look, we have got to find a way to stop this. We have full-time arbitrators in each port." It was agreed that there would be no claim of onerous workload which would result in a work stoppage, that the men would immediately call for an arbitrator who would go to the site of the [408] work and would call it, and either tell the men to continue to work as directed or say there ought to be additional men or machines added.

This was fine in theory, but the arbitrators began having their legs run off at 2:00 or 3:00 o'clock in the morning, and the union agreed with us that they would develop a procedure whereby no man on the job would assert a claim of onerousness simply as a matter of a gimmick that any claim of onerousness would have to be made in good faith, and the good faith would be determined by having the business agent in the port go to the job, view the work, and then call an International officer in San Francisco and ask permission to call the arbitrator, and the International official said, "We will tell you right now we are not going to be talking to business agents at 3:00 o'clock in the morning," and that result has been that if there are arguments about onerousness the arbitrator is available.

We have very few of them, and this does keep the work going, so even this particular type of operation has been an improvement in the agreement reached on October 18th.

Work stoppages are now a rare thing, and job action is a rare thing on this Coast where previously it was a rule on a day to day basis.

Q. Mr. St. Sure, if as a result of this proceeding the Federal Maritime Commission should take jurisdiction of [409] this matter, and determine that the method of assessing automobiles was somehow illegal, what in your opinion

would be the consequence as to this plan? A. Well, I assume that the plan would immediately be in jeopardy in that we as employers are obligated to fulfill the commitment of $5 million a year. We would still have to find some method of raising the money, and I think we might then call upon the Board to come in and tell us how to do it.

I think the union would expect them to do so, also, because this is getting into an area of collective bargaining relationships where a commitment has been made which has to do solely with the employer's obligation to meet contractual commitments to the employees within the bargaining unit.

I could visualize not only chaos but I think I likewise visualized the Board having to come in and call the shots on every bargain that we made here on out. Every agreement we make in relation to bargaining has an indirect effect—

Q. Including wages? A. Including wages, fringe benefits, sick leave, all the rest of it.

Examiner Theeman: Off the record.
(Discussion off the record.)
[410] Examiner Theeman: On the record.
Mr. Ransom: That is all.
Examiner Theeman: A five-minute recess.
(Short recess.)
Examiner Theeman: On the record.

Cross-examination by Mr. Madden:

Q. Mr. St. Sure, in the assessment of basic dues for the purpose of keeping the PMA running, which is based at least in part, as I understand it, on tonnage, who pays the dues on tonnage which is carried by a PMA member steamship company discharging on the Pacific Coast? A. The stevedore terminal operator. We have a variety of such

dues. I mean a PMA member operating on the Pacific Coast as a steamship operator pays a separate set of dues to cover the cost of negotiation of offshore contracts based upon personnel employed aboardship, but the so-called cargo dues and the manhour dues are based upon the tonnage paid by the stevedore or—

Examiner Theeman: Let us go off the record a moment.

(Discussion off the record.)

Examiner Theeman: On the record, please.

The Witness: My understanding is that the member dues for PMA steamship company members may be paid either by [411] the stevedore or the terminal operator or by the steamship company directly.

However, the stevedore or terminal operator is responsible for the payment of so-called tonnage and manhour dues with reference to non-member companies that he may serve. This is consistent with the voting procedure in PMA where the stevedore can vote under our present by-laws the tonnage of non-member companies he serves, but the steamship line votes its own tonnage; in other words, extracts it from the stevedore who serves him and votes it himself, so for this or perhaps other practical reasons this is the alternate method of payment.

By Mr. Madden:

Q. I will refer you to Exhibit 35, which is a declaration or bulletin to members with reference to implementing the mechanization and modernization fund dated January 17th.

In paragraph 7, you will note that it provides that "Declarations of tonnages will be made, as in the past, by member steamship companies and contracting stevedores reporting for non-member companies and government agencies,

being made in exactly the same manner by such companies as PMA dues."

Then am I correct that, so far as the basic dues are concerned, that the member steamship company might still report his tonnage and pay direct right to PMA the assessment [412] for those dues? A. I believe that is true, yes, sir.

Q. And for the shore members of the PMA, such as the stevedore and terminal operators, their tonnage dues in such situation would be limited to the tonnage handled for the non-member companies and government agencies? A. Well, that would be so. I mean the total tonnage is covered in one fashion or the other.

Q. Now, apparently from this bulletin originally it was contemplated the same method would be followed in collection of the mech fund assessments, but I understand that is not the case. Do you recall when that change occurred? A. Yes, I do. I think administratively, when the fund was initiated, Mr. Saysette's department, and I am sure with my approval, simply adopted the method that had been followed for the collection of tonnage dues.

We then learned that this was part of a bargaining agreement and a specific payment as part of the bargaining agreement, and because of the requirement that we had with the Internal Revenue's requirement that the assessment be paid directly by the employer of the labor, it was introduced and the instructions were therefore changed.

I should indicate that the entire approach, from the standpoint of it being a bargained benefit, was so novel that we were on rather strange ground with the Internal [413] Revenue Service in getting approval of this, and it was only with the specific assistance of the Secretary of Labor, who recognized the type of agreement that we had reached, that we were able to get the Internal Revenue Department which permitted the reductions to be made because part of the

agreement that we had with the union was that the mech fund would not come into play unless it were approved by the Treasury Department, as a deductible item, as a wage or collective bargaining payment.

Q. As far as the basic dues are concerned, though, the tax problem, I assume you would agree does not arise if a member steamship company pays his dues directly to PMA? A. I assume not. I hope there is no problem involved.

Q. But in order to qualify for this mech fund set-up, it was necessary to change the method so that the direct employers of the men made all the payments? A. Well, I assume a change was made to relate it to what in fact it was, a wage bargaining settlement.

Q. I believe in your testimony you stated rather clearly the distinction between the benefits provided in the labor contract and the method employed to collect that benefit.

If I wrote it down correctly, I believe you stated in effect the contract provides for the benefit, but the method of collection is no part of the contract. It is [414] between the employers themselves. A. Correct.

Q. And when the PMA ratifies the overall package, you might say, they in effect ratify the contract, and then they ratify the method of assessment at the same time. A. Yes, our own members required that the method of assessment be determined before they would vote on a ratification of the contract.

Q. I see. A. So this was part of the total ratification.

Q. I believe you also stated that it was recognized by the PMA and those who were working on the plan that the aim of the contract was to give equal opportunity to all interested persons to develop new methods of handling cargo, but it couldn't really be expected that equal results would result to all operations. A. That is correct. There would be differences in trade, differences in commodities, differences in money vested, differences in the imagination of the opera-

tors to devise new methods. Each of these things would produce a different result.

Q. And each of these opportunities that you referred to as equal opportunity to adopt methods were available in effect to all members of PMA and not merely the stevedores or terminal operators, but they were intended to benefit [415] the steamship operators in turnaround time, improvement to vessels, and so forth? A. That is correct.

Q. To your knowledge, did the directors give any consideration to the effect of a tonnage assessment, based on this traditional method that the PMA used in basing dues, what effect it would have on actual stevedoring and terminal operations themselves, or was it just a convenient and available method to tie it into a revenue ton basis? A. I am not sure I follow you. The method that the industry had used in connection with tonnage assessments in other areas has been well established over a period of years based upon the custom of the industry in manifesting or freighting cargo.

I don't recall any discussion with regard to whether it was an improper method or whether anybody raised any question that it was. The basic debate in the industry was the question of manhours against tons. I mean this was the problem that we were wrestling with.

Q. But the method of collecting dues on a revenue ton fell on the steamship company which reported its tonnage and on the stevedore who reported the non-membership tonnage.

Now, in assessing for the mech fund the direct burden of paying for all this tonnage falls directly upon one of the two, that is, the contracting stevedore, does it [416] not? A. Well, the burden falls on the contracting stevedore in the same sense that a wage increase falls on the contracting stevedore. It falls directly on him where welfare charge or whatever goes into the package that you have to deal

with the union about, these are total charges of labor costs which go into the bargaining agreement.

Q. What I am driving at, Mr. St. Sure, is you think that a revenue ton basis which is used by steamship companies in determining rates for carrying cargo is an appropriate measure in determining the assessment which would fall on the handlers of the cargo at the loading or discharging port, and when I say revenue tons I am talking about revenue tons for the purpose of measuring the tonnage which is assessed. A. Well, I can only speculate as to that. I don't know. I mean the whole area of rate making and things of this kind is completely foreign to me, and even the distinction between weight ton and revenue ton has been a mystery to me.

I can simply say that this was a method which the industry had used, and it was adopted. It was specifically referred to the people operating in the industry, both foreign and American interests, and they came up with a recommendation, and this was adopted.

[417] Q. How is the coastwise cargo charged under the mechanization fund; that is, it is loaded on the Pacific Coast and discharged on the Pacific Coast so that there are two handlings of the cargo. Do they pay a full assessment at the loading? A. Well, again, traditionally, there have been the recognitions of the fact that the same cargo was handled twice under the collective bargaining agreement, and with regard to the labor functions under PMA the coastwise operators, when they were still running, and maybe one or two occasionally now were given recognition of the fact that since this did relate to the collective bargaining agreement they shouldn't have to pay twice, even though there might seem to be some anomaly in this situation.

If there had been some agreement with regard to costs in that area or similar areas with regard to coastwise operators—

Q. Is that true on carriage to the Hawaiian Islands? A. No, this was the Matson people who have a separate mechanization fund now which operates for the same purpose, so they meet it at both ends of the line.

Q. You referred to a packaged lumber penalty of $1.00 per man hour which was negotiated at an earlier dispute in order to permit lumber to be shipped in packages. Is that correct? [418] A. That is my recollection of it. It was before my time, and I had merely heard of the Chamberlain dispute, and the resulting $1.00 penalty to permit this particular method to be used.

That is my knowldege of it, based on that type of report.

Q. Do you know whether that penalty still continues? A. No, I understand that only the coastwise operators are involved who are not members of PMA, but I understand that they have been able to negotiate some agreement whereby the $1.00 penalty has been replaced by what the union regards as an equivalent payment under the mech fund, and the $1.00 penalty, as such, has now been wiped out.

Q. Originally coastwise lumber was assessed under the mech fund, was it not, at 27½ cents per thousand board feet, as a measurement equivalent of tonnage? A. It could be. If this is so, I will accept it. I am not familiar with that detail.

Q. I believe it appears— A. Forty cubic measurement and 1,000 board measurement, constituting a ton on Exhibit 35?

Q. Yes, sir. A. Yes, sir.

Q. Do you know whether it is still assessed on this basis? [419] A. I do not.

Q. At the time that the formula of the assessment for the mech fund was adopted in January of '61, do you know whether the directors were aware of the volume of foreign automobile imports to the Pacific Coast at that time? A. Well, the matter was discussed, I recall, because the question was specifically raised as to the application of the

assessment to foreign automobiles, particularly Volkswagens.

Now, what detail the questions in volumes of amount or what specific tonnage, I don't recall any specific question on that score.

Q. As an aside, do you attend the board of directors meetings? A. I preside at them.

Q. When the formula for the mech fund assessment was first adopted—that would be, I take it, about January 16, 1961, according to this memorandum—at this particular time were the directors aware that the assessment on unboxed automobiles would be on a measurement ton basis, or was that something that developed later? A. No, I believe they were aware of it. I believe the matter was discussed prior to the time of the membreship ratification on the 4th of January. I think this was all in the package, and in the discussion, both before the [420] membership ratification, before the directors' second action.

The directors first voted to recommend to the membership and the membership ratified this action on the 6th of January. These matters were under discussion prior to ratification.

Q. Well, isn't it true that at the meeting, on approximately the 4th of January, there was no discussion as to how the tonnages would be applied; that is, on a weight or measurement basis? A. (No response.)

Q. Wasn't it merely a general resolution that the assessment would be made on a tonnage basis? A. I think this is true of the discussions. However, when I presented the matter to the membership, this was discussed in this fashion.

Q. In the two years during which the mech fund or the M&M program has been in force, can you state from these studies or reports that you had who has benefitted the most from the program? A. No, I cannot. The studies show averages on a port basis for commodities by group. They show that the principal benefit has been in the Port of Los

Angeles. We would expect it to occur because of the lower base to start from. It shows that during some portion of the first year that actually we did less in the Northwest ports than we have been [421] doing previously on an average basis.

The reports we have do not enable us to pick out specific employers of individual companies as to individual cargoes.

Q. I would like to ask you your personal opinion as to whether a measurement ton assessment on automobiles at the same rate per ton as applied to other commodities, excluding bulk commodities, is an equitable basis for assessment. A. I don't know that I have any opinion on that. It would seem to me that if a measurement ton basis was used by the industry for the purpose of determining freight rates, it might well be used for some other purpose.

I simply have no opinion on the subject. I assume that we have been operating on what the industry's practice and custom has been with relation to applying charges to specific operations.

I mean the argument philosophically about whether or not for example a low cost cargo should have to bear the same rate as a high freight cargo, this gets into an area of economics I am not qualified to speak on.

Q. You are aware, though, are you not, that a full cargo of Volkswagen automobiles from a ship is an operation that requires both before and since the mech fund assessment a great many less manhours than cargo, generally? [422] A. No, I wouldn't know that. I frankly don't know.

Q. I assume, though, that this argument has been made to the board of directors by Volkswagen and others who have protested the assessments from time to time? A. The Volkswagen representatives did appear before the committee that was originally charged, and a committee which was later reconstituted, to again review the matter in response to a suggestion at the membership meeting that the total matter be reviewed within six months because of

protests that were made specifically by Volkswagen, and some other cargoes, and the committee reviewed the matter, and their recommendation was that the method of assessment, as recommended, be continued.

Q. Do you know of your own knowledge whether Volkswagen has protested the entire mechanization assessment or only the amount of its impact upon its operations? A. I have seen correspondence where they have indicated they are not opposed to the total program, but they are opposed to its impact upon Volkswagen.

Q. It is true, is it not, that so far as the assessment on a measurement basis of unboxed automobiles, the increase in the cost of discharge is at a considerably higher percentage than for general cargo and bulk cargo? A. Well, frankly, I have never seen an analysis of [423] this. We have in the productivity report, as I recall, some 600-odd items of cargo. This might or might not be true if a comparison were made of all the items handled in a so-called general cargo operation.

I just don't know.

Mr. Madden: I think that is all, Mr. St. Sure.

Mr. Ransom: May we go off the record for a moment?

Examiner Theeman: Off the record.

(Discusson off the record.)

Examiner Theeman: On the record.

Without objection, a letter dated March 16, 1961, from PMA to its members, is admitted in evidence as Exhibit 55.

(The document above referred to was marked Exhibit No. 55 and was received in evidence.)

Examiner Theeman: A letter dated December 14, 1961, from PMA to its members, Exhibit 56.

Ellet G. Horsman—for Respondent—By Examiner

(The document above referred to was marked Exhibit No. 56 and was received in evidence.)

Examiner Theeman: And a letter dated December 20, 1961, from PMA to its members, is admitted in evidence as Exhibit 57.

[424] (The document above referred to was marked Exhibit No. 57 and was received in evidence.)

Mr. Ransom: Thank you. I have no further questions.

Mr. Zimmerman: I have no questions.

Examiner Theeman: Thank you very much, Mr. St. Sure.

The Witness: Thank you.

(Witness excused.)

Examiner Theeman: The hearing will be recessed until 2:00 p.m. tomorrow.

(Whereupon, at 4:20 o'clock p.m., the hearing in the above-entitled matter was adjourned, to reconvene at 2:00 o'clock p.m., Friday, April 26, 1963.)

* * *

[427] Whereupon, ELLET G. HORSMAN, was recalled as a witness by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination by Examiner Theeman:

Q. Just to review a moment, Mr. Horsman, under some questioning by Mr. Madden, you stated that in January 1961 there was a meeting at the PMA which you attended, and it was also attended by a number of other stevedores, and you gave a list of the number of stevedores that were there at that time.

Ellet G. Horsman—for Respondent—By Examiner

As I recall it, you listed among the stevedores a number who were handling Volkswagens and a number who did not handle Volkswagens, is that correct? A. Could I have a review of the names I mentioned? I think the names mentioned were primarily the stevedores who at that time were handling Volkswagens, and that is why the names were still familiar in my mind.

Q. Well, I don't have the list of names. They are on the record, and I believe under subsequent questioning there [428] was a statement by you that some of those stevedores did and some of them did not handle Volkswagens.

Do you recall whether that is correct, or would you care to list again the names of the stevedores that were there? A. The names I believe I mentioned were—I will give the surnames, Ebby, Smith, Anthony and Whisnant.

At the time, these were men who represented their stevedoring companies, and at that time had or were going to handle Volkswagens, but they are primarily not only contractors who only handle Volkswagens.

Q. Well, do you recall any other stevedore? Again on the record I believe these were more than five named by you. A. In fact, there was a representation of all the stevedoring firms on the Pacific Coast.

* * *

[429] Q. Now, will you state for the record what your experience was with the common carriers? A. Pertaining to vehicles?

Q. Pertaining to vehicles. A. There are several common carriers in which Marine Terminals Corporations have contracts with that have carried cars over the past three years.

Other than Volkswagen's objection to the method of assessment, strong objection has also been given to us, both orally or verbally, and through written comments

from [430] Hanseatic Vaasa Line who, next to Volkswagenwerk, are our largest account carrying automobiles for discharge on the Pacific Coast.

The other carriers which I have named earlier gave no written comment, and if they had given verbal comment, whether for or against, I cannot remember. They could have directed their comments to other members of our firm.

Q. The common carriers paid the bill? A. The common carriers have paid the bill.

Q. Are they still continuing to pay the bill? A. They are still continuing to pay the bill. However, we have been put on notice by the Hanseatic Vaasa Line that they expect equal treatment from our association, Pacific Maritime Association, as would be given to Volkswagenwerk.

Q. And your bill shows still the mech fund assessment as a separate item? A. Yes.

Q. For automobiles, whether it is a Volkswagen or other automobile? A. No, in billing a common carrier we only show the total amount of tons that are assessed. In other words, if you have a thousand measurement tons of automobiles and 200 weight tons of general cargo, your invoice would show 1200 tons as the mechanization fund.

In the bill of itself we do not break down between [431] automobiles and general cargo, but it is there.

It can be ascertained from the body of the bill, but actually extending the assessement it is not separated from general cargo.

Q. That is your grand total of assessment? A. Yes, sir.

Q. But the assessment itself is broken down by individual items to show the amount for the mech fund and the amount for general cargo? A. Yes.

Q. Excuse me, the amount for the mech fund for automobiles and the amount of the mech fund for general cargo? A. No, it is all lumped together. I mean it is just the total amount of revenue tons based on the mechanization fund

assessment times the present amount, 27½ cents or 26½ cents.

Q. Do I understand that general cargo, then, is also assessed at 27½ cents a measurement ton? A. No, it is as freighted or as manifested. There are formulas or instructions that we have on what commodity takes it on a weight, and what commodity takes it on a measurement basis.

Q. Well, just to clarify it, would you give me an example of the way in which the bill occurs where you have an automobile, and then you have some other type of general [432] cargo than automobiles which does not take the same mech fund assessment as an automobile? A. Let's take an example. We have a ton of Borax and we have a ton of cotton, and we have one automobile. The mechanization fund bill would show the Borax at one weight ton, the cotton at one weight ton, and the automobile, if it measured ten cubic tons, would show ten for a total of 12 times 27½ cents.

• • •

By Mr. Zimmerman:

Q. Mr. Horsman, you mentioned the names of four men to whom you talked at these PMA meetings. Would you mention [433] the names of the stevedore companies that were represented by those men? A. I believe, Mr. Zimmerman, that I gave that the other day, but to go back over it, Mr. Ebby, representing California Stevedore & Ballast Company in San Francisco, Mr. Fred Smith of Seattle Stevedoring Company in Seattle, and Mr. John Anthony, Associated Banning Company in Los Angeles, and Mr. Neil Whisnant, Brady-Hamilton Stevedore Company, Portland, Oregon.

• • •

Ellet G. Horsman—for Respondent—Cross

Cross examination by Mr. Madden:

* * *

[436] You stated that subsequent to this meeting you then billed Volkswagens and other foreign cars by putting the mechanization fund as a separate item. Did your method of billing have any bearing on the fact that you had had the meeting? A. No, this was the instruction on how this was to be billed. As I remember, that was the reason for the meeting.

Q. But did it have any bearing on this after the meeting, discussion? [437] A. At the time, it hadn't actually gone into effect yet, the actual billing. In other words, there was still a question of what the various commodities would bear, bulk, scrap, automobiles, and at the time it was decided that the rate would be so much a ton, and bulk was then given a reduced rate from the original thinking, and I believe it wasn't until February 1961 that the actual billings took place, and the method of billing was, of course, up to the stevedore.

And one of the reasons for the meeting—or it wasn't actually a meeting of the stevedores. It was why we were at a general meeting of the PMA—our concern was that if the mechanization fund is applied against automobiles on a measurement basis, our customers were going to object, but at the time there was no ship that hadn't billed yet, and it must have been another, so it was after this meeting that actually went into effect.

Q. So that all billing was subsequent to the meeting? A. Yes, sir.

Q. There wasn't a change in billing procedures as a result of the meeting? A. No, sir.

Q. You hadn't billed before? A. We hadn't billed it. It was some month later.

Q. Tell me, what was the conversation of the group [438] of these stevedores, either before or after the main

meeting of the PMA at this time? What were you talking about? A. We knew beforehand that if the mechanization fund on automobiles was placed on a measurement basis, that our customer would object, and it would be our position to hear their reasons for the objection, and place these objections before our association.

Mr. Ransom: No further questions.

By Mr. Madden:

Q. Was the reason that you knew your customers would object the fact that you all knew that it would be necessary to pass this assessment on to the customers? A. I don't know.

Q. As a cost? A. I gathered in the conversation that no one could absorb this in their present commodity rate at the time.

Mr. Madden: That is all.

The Witness: I can't say this for sure. We could not, Marine Terminals Corporation.

• • •

Exhibit 1-A

[1] (Memoradum of Understanding

Between

Pacific Maritime Association
(on behalf of its Members)

And

International Longshoremen's and
Warehousemen's Union

(on behalf of itself and all Longshore and Marine Clerks Locals in California, Oregon and Washington))

The following statements cover those items agreed to by the parties in the 1959 negotiations as amendments to the 1958 ILWU-PMA contracts, which contracts are re-executed, except as modified hereby:

Wages

Longshore

The basic straight-time wage rate for men paid on a 6-hour day basis shall be increased by 11 cents per hour effective 8 a.m. Monday, June 15, 1959. This brings the basic straight time rate to $2.74 per hour and the overtime rate to $4.11 per hour.

For special categories of Longshoremen historically paid on an 8-hour straight time basis, the basic straight time rate shall be increased by 12½ cents.

Clerks

The straight time rate for Clerks is increased by 14 cents per hour, bringing the rate to $2.93 straight time and $4.39½ overtime. (This is the increase applicable to Longshoremen on an 8-hour basis, plus 1½ cents.)

The Clerks will receive additional increases of 1½ cents effective as of the day shift on the Monday nearest June

15, 1960, and June 15, 1961; thus over the three year period of the contract, getting a total additional increase of 4½ cents. It is agreed that this amount wipes out the earnings differential between Clerks and Longshoremen.

Over and above these increases, Supercargoes and Chief Supervisors are to receive 4 cents per hour additional, effective as of the day shift June 15, 1959, and as of the day shift on the Monday nearest June 15, 1960, and June 15, 1961. It is agreed that this amount (12 cents) wipes out the earnings differential between these men and walking bosses.

RETROACTIVITY

It is agreed that the wage adjustments negotiated for 1959 shall be effective with the day shift on Monday, June 15, 1959, and retroactivity shall apply up to but not including August 10, 1959. If the Union has not approved this settlement on or before August 10, 1959, then the Employers shall continue to pay the rates of pay in effect prior to this settlement and shall continue payments of wages on that basis until notified in writing that the Union has accepted [2] the revised rates as negotiated. When such written notification is received the Employers will then place the new rates in effect on the day shift of the Monday following such notification, and the application of retroactivity will be applicable for the period starting with the day shift on Monday, June 15, 1959, up to but not including the day shift beginning on Monday, August 10, 1959.

MECHANIZATION

Mechanization and the utilization of laborsaving devices have been a subject of discussion between the parties since 1957. During the course of the 1959 negotiations the following items were agreed to on this subject.

Exhibit 1-A

To allow a certain amount of time (not more than one year) for the parties to further study and gain factual experience:

(1) of actual changes made by laborsaving machinery, changed methods of operation, or proposed changes in working rules and contract restrictions, resulting in reduced manpower or manhours with the same or greater productivity for an operation;

(2) of savings to the employer because of such changes;

(3) of a proper share of such savings to be funded as hereinafter provided; and

(4) of the manner of distributing such fund to the fully registered work force:

A) PMA proposes to create a coastwise fund for the fully registered work force, through contributions by the Employers to be accumulated during the first ensuing contract year, in the amount of one million five hundred thousand dollars. This amount, in addition to "buying time" for necessary study and experience, represents a recognition by the Employers that savings accrue as a result of mechanization and changed methods of operation, and a recognition by the Union that no additional payment is due for changes made or to be made prior to June 15, 1960. This payment shall constitute a part of the consideration for renewal of the contract, and shall be distributed to the fully registered work force in a manner to be determined. (Tax and legal problems to be resolved.)

B) It is the purpose and intent of the parties, during the course and as the result of this study period, to achieve and meet the following aims and objectives:

Exhibit 1-A

1. To guarantee the fully registered work force a share in the savings effected by labor saving machinery, changed methods of operation, or changes in working rules and contract restrictions resulting in reduced manpower or manhours with the same or greater productivity for an operation.

[3] 2. To maintain the 1958 fully registered work force, with allowance for normal attrition.

3. To create a coastwise fund for that work force through contributions by the Employers, such contributions to come from savings described in paragraph B) 1. hereof.

4. To provide that this fund will be separate from contractual wages, pensions, welfare and vacations.

5. To guarantee the PMA the right to make changes, and remove restrictions along with protection against reprisals for making such changes, and enforcement under the contract of such changes if and when made.

During the ensuing year, in addition to making of such study, the following agreements shall be in effect:

a. PMA will accumulate the one million five hundred thousand dollar fund as provided in A) hereof.

b. PMA shall be free to make such changes as are deemed necessary under Section 14 of the present Longshore contract, and Section 25 of the present Clerks' contract, restricted however by the observance of rules prohibiting individual speed-up and unsafe operations. The load agreement shall continue.

Exhibit 1-A

Except for changes in operations made hereafter by introducing laborsaving devices in addition to those already used and practiced by him in the past, the Employer shall not invoke the provisions of Section 14 of the Longshore Agreement or Section 25 of the Clerks' Master Agreement during the ensuing year. Nor shall the Employer seek a reduction of gang sizes or number of Clerks, elimination of multiple handling, or other existing contract or working rule restrictions with relation to operations now existing, except during future annual review negotiations or by mutual agreement.

c. The parties will continue negotiations on the matters outlined in this proposal for a period of not to exceed one year for the purpose of determining a basis for converting the above fund and Employer contributions thereto to a continuing basis which will meet the aims and objectives set forth herein. Such negotiations shall not exclude tonnage taxes, manhour assessments, or any other basis of conversion, nor exclude conversion of present contributions for welfare, pensions and vacations.

[4] d. The parties shall continue to operate in accordance with the terms of the contract and working rules, with mutual agreement against reprisals and for enforcement of the contracts, working rules and the provisions of this agreement.

8-Hour Guarantee

A. Applicability

1. There shall be a guarantee of 8 hours of work to men when ordered and turned to work.

(a) This guarantee shall apply only to fully and limited registered Longshoremen and fully and limited registered Clerks.

(b) It shall go into effect on the day shift on January 1, 1960, for Longshoremen; for Clerks it shall be effective upon approval and ratification, prospectively August 10, 1959.

2. On the day shift, the 8-hour guarantee of work must be provided between the hours of 8 a. m. and 6 p. m.

On the night shift, the 8-hour guarantee of work must be provided within a spread of nine (9) hours from the normal starting time, excluding the meal hour. (This shall not change San Francisco Rule #2, Page 63, Brown Book.)

B. Method of Payment—Dead Time

1. In the event that dead time results, and 8 hours of work cannot be provided, dead time on the day shift from Monday through Friday shall be paid for at the straight-time rate of pay.

> Note: When dead time is created at the beginning of a day shift by starting later than 9 a. m., overtime shall not apply until 6 hours have been worked or until 5 p. m., whichever occurs first.

2. All other dead time—nights, weekends and holidays—shall be paid for at the overtime rate of pay.

3. No penalty cargo rates shall be paid for during dead time.

C. Exceptions to 8-Hour Guarantee

1. (a) For men ordered, reporting for work and not turned to, the 4-hour minimum shall apply, except where inability to turn to is a result of insufficient men to start the operation. Present port rules defining number of men required to start operations shall apply.

Exhibit 1-A

(b) Where a Clerk is ordered to work against a ship and cannot turn to because of insufficient men as in Rule C. 1. (a) above and there is no place to shift said Clerk, the 4-hour minimum shall apply.

2. Longshore baggage men and linesmen, but not baggage Clerks are excluded from the 8-hour guarantee, and their minimums remain uncharged from the 1958 minimums.

[5] 3. When Longshoremen and/or Clerks are employed at Selby, California, (This applies to Selby only.) Employers may shift men to other operations to fill out the 8 hour guarantee, otherwise the guarantee is only 4 hours. If men are not shifted to other work but are ordered back after a mid-shift meal, a second 4-hour minimum shall apply.

5. The inclement weather exceptions to the 8-hour guarantee shall be as follows:

(a) When men are turned to, and work cannot commence or continue because of bad weather (such determination to be made by the Employer), a 4 hour minimum shall apply.

(b) When men are ordered to return to work after a mid-shift meal and work cannot resume because of inclement weather (such determination to be made by the Employer), a second 4 hour minimum shall apply.

(c) Dead time resulting from inclement weather shall be paid for as provided in Paragraph B.

5. Present rules governing stop work meetings shall continue. Any hours lost as a result of such meetings are deductible from contract minimums. Similarly, any hours lost as a result of short shifts resulting from union unilateral

action or mutual agreement of the parties are also deductible.

6. In those ports where a 4 p. m. or 5 p. m. stop is provided by rule for specific days, the minimum guarantee on such days shall be from the starting time, which for payroll purposes can be no later than 9 a. m. to such 4 p. m. or 5 p. m. stop.

7. (a) When an operation of short duration requires extra Longshoremen from the skilled classifications and such men are ordered and turned to, they shall be entitled to a 4 hour minimum, and can be transferred to comparable work on the original dock or ship to fill out this minimum.

(b) When such men are shifted to comparable work on other docks or ships or are ordered back after a mid-shift meal the 8 hour guarantee shall apply.

8. When gear men are called in on an emergency, local rules rather than the 8-hour guarantee shall prevail.

9. When men have been ordered and fail to report to work at all or on time, thus delaying the start of an operation, the time lost thereby until replacements have been provided or until the man or gang has turned to shall be deducted from the guarantee.

10. Men or gangs refusing to shift, quitting or discharged for cause, shall be paid only for the time worked.

[6] 11. A replacement gang ordered from the dispatch hall to replace a quitting gang shall not be eligible for the 8-hour guarantee, but shall be eligible for the 4 hour minimum. This only applies when a gang quits during the course of the 8 hours of work or quits by refusal to work

the extensions for shifting or sailing provided in the agreement.

12. Where men are turned to and work less than 8 hours by reason of quitting, discharge for cause, or injury, and a replacement is ordered by the Employer, the 8-hour guarantee is not applicable and the men shall be paid as follows:

(a) The man being replaced to be paid for time worked;

(b) The replacement is to be paid for time worked, or the 4 hour minimum, whichever is greater.

D. Maneuverability and Flexibility of the Work Force

1. In order to prevent as much as possible Employers being required to pay for "dead time" or time not worked by the application of the 8-hour guarantee, the Employers shall have maximum maneuverability and flexibility of the work force, Longshore and Clerks. They may shift men and gangs—from ship to ship, from direct employer to direct employer, from steamship company to steamship company or any combination thereof.

(a) Employers shall have the right to shift men and gangs at their option in order to fill out the work guarantee. Men and gangs must shift as ordered.

(b) Employers may move skilled longshore classifications, such as winch drivers, hatch tenders, gang bosses, crane men, lift drivers, jitney drivers, etc., to comparable work: 1) on board ship, 2) on the dock, 3) on barges or between any of the locations listed in 1), 2), and 3), and the men shall be obligated to shift. No skilled classifications will be

required to shift and do physical labor (hand handling) such as dock work, car work, hold work, etc.

(c) Skilled classifications of clerks, such as supercargoes, supervisors, etc., may be shifted by Employers to comparable work or to any Clerks' work to fill out the shift guarantee without reduction in their skilled pay rate.

(d) Men in ship gangs can, at the option of the Employers, be shifted to any other work including all dock and car work in order to fill out a shift.

(e) Dock men or dock gangs shall not be shifted to work aboard ships to get the 8-hour guarantee but may be shifted to any work on docks, cars or barges.

[7] (f) In those ports where working rules do not now provide swing men (ship or dock men), the Employer has the option to order up to two swing men for each discharge gear working. These swing men may be used for any dock work and/or for hold work in any hatch. This will hold true whether or not dock men or gangs are ordered and whether or not, under local rules, dock men or gangs must be released as a unit.

In those ports where working rules do not now provide swing men (ship or dock men), the Employer has the option on loadouts to order additional hold men (not to exceed two for each gear working) for assignment as needed. These men may be used for any dock work and/or for hold work in any hatch.

(g) Men in specialty, shoveling, and freezer gangs can, at the option of the Employers, be shifted to any other work including all dock and car work in

order to fill out a shift. When so shifted, the penalty cargo rate shall not prevail.

(h) The Employers shall have the right to order back after an initial or any subsequent shift only such gangs as are needed to finish the work remaining. (This is intended to minimize the necessity of shifting men or gangs to other jobs or ships to fill out the 8-hour guarantee.) Such gang or gangs ordered back must be the gang or gangs which the Employers believe in good faith have the most work to do at their respective gear, and they are to finish the work, if any, at the gear of the gangs released at the end of the previous shift if ordered to do so. Under such circumstances the gear priority of the gangs released is suspended. When gangs are not ordered back under this rule they cannot be replaced by new gangs at that gear until the second subsequent comparable shift. This rule is not to be used as a subterfuge for firing gangs.

(i) The shifting of registered and limited registered men to fulfill the guarantee shall be carried out without bumping other men to create available work.

2. Accompanying the obligation placed upon the Employers to furnish 8 hours of work each shift is the obligation on the part of the men to shift from one job to another for the purpose of working a full shift when such move is ordered by the Employers.

3. The Union recognizes that late initial starts will occur and agrees that men will work ships with late initial starts. (See Paragraph B. 1. *Note.*)

4. The employers have the right to relieve hatches during meal hours.

[8] 5. Existing gear priority rules will be suspended or changed when necessary to facilitate shifting of men and gangs for the purpose of guaranteeing the full 8-hour work shift. "Center line" and "imaginary bulkhead" and similar practices which result in arbitrary division of work among gangs shall be eliminated.

6. Existing contract leeway provisions for finishing ship to shift (2 hours) or sail (3 hours) shall remain unchanged.

7. Men and gangs shall go to meals as directed by the Employer and shall return to complete a shift after a meal when a shift is extended for shifting or sailing.

E. Rules and Examples Applicable to Shifting Men and/or Gangs.

1. Initial late start orders may be placed at the dispatch hall to work a ship and to shift to a second ship for a late start on the second ship when ordered to do so.

Note: The purpose of men being notified by orders at the hall at the time of dispatch is to know in advance that the ship they are being dispatched to is the second ship, with the first ship being worked as a fill-in job for the purpose of making 8 hours.

2. Men or gangs may be ordered to shift from a job or a ship that they have completed to a late start on another job or ship. Such men or gangs will be released at the end of the shift on the second ship and may be required to work no longer than the extended hours herein provided for, if such extended hours are necessary to complete the work on the second ship for shifting or sailing.

Exhibit 1-A

Such shifting of men or gangs may be accomplished without clearance through the dispatch hall.

3. Men or gangs may be ordered to shift from a job or a ship on which they have not completed their original assignment to permit a late start on another job or ship, or in order to fill out the 8-hour work guarantee, or in order to finish the second ship for shifting or sailing. These men or gangs will be ordered back to their original job during that shift or for the start of the next day's shift, and such shifting of men or gangs may be accomplished without clearance through the dispatch hall.

If the work on the second ship is of such amount as to require working the extended hours in order to permit the ship to shift or sail, the men or gangs will work up to but not beyond the end of such extended time.

4. Men or gangs may be ordered to shift from a job or a ship which they have not completed but where they have run out of available work because of delay in arrival of cargo, breakdown of equipment, etc., to another job or ship in order to complete the 8-hour guarantee, and they will be ordered to return to their original job to finish it. Such shifting of [9] men or gangs may be accomplished without clearance through the dispatch hall. (This rule also applies when a ship fails to arrive as scheduled.)

5. Gangs will have gear priority on only one ship during each shift and will be released to the dispatch hall at the end of any shift in which they have completed their work on the ship on which they had priority. (This does not negate D. 1. (h)).

6. There shall be no second or additional guarantee attached to turning to on new assignment after shifting.

Exhibit 1-A

F. One Hour Leeway to Finish Car Work or Truck Work.

When dock work on cars or trucks is started but is incomplete at the regular quitting time, an extension or leeway of one hour to finish the job will be permitted, providing men are not sent to a meal.

G. Guarantee for Gangs that Travel.

When gangs are travelled and, as a result, their starting time is such as to make it impossible to fill out the guarantee between 8 a.m. and 6 p.m., the guarantee shall be pay or work until 6 p.m., except for the meal hour. For example, if men arrive on the job at 9:30 a.m. following travel, then their guarantee will be 7½ hours.

H. Meal Hour.

1. The meal hour shall be between 11 a.m. and 1 p.m., that is, the noon meal hour can be at 11, 11:15, 11:30, 11:45 or 12 noon.

2. The night shift meal hour shall be at either 10 p.m. or 11 p.m. in those ports whose normal starting time is 6 p.m. and at either 11 p.m. or 12 midnight in those ports whose normal starting time is 7 p.m.

3. Men and gangs shall go to meals as directed by the Employer.

I. Small Ports.

The full provisions of the 8-hour guarantee shall prevail in all ports. However, in small ports—6 gangs or less—it is understood that if these ports wish to make adjustments

in leeway for late starts because no alternative work is available to fill out the 8-hour guarantee, this can be done by mutual agreement at the local level providing there is advance approval by the Joint Coast Committee.

[10] NEW EQUIPMENT

It is recognized that the Employer has the right to select competent men for all operations. When new types of equipment are introduced in connection with cargo handling covered by the contractual definitions of work, such new equipment shall be operated by employees under ILWU contracts, with the understanding that competent men shall be made available by the ILWU, with adequate experience or training. This proposal shall not change the status quo as to assignment of other than ILWU workers on existing equipment.

VACATIONS

The present contract vacation provisions were amended as follows:

1. JURY DUTY VACATION ELIGIBILITY

Any registered man covered by the ILWU contracts who shall be summoned for jury duty shall be entitled to have his actual hours of attendance at court as juror be counted as qualifying hours for vacation eligibility. (Note: Actual hours in this instance are all hours at court, waiting to serve on a jury, or actually serving on a jury.)

2. Any registered Clerk or Longshoreman who has 25 qualifying years in the industry and is paid for 800 hours but less than 1344 hours in the preceding year, thus earning one week's vacation, shall receive an additional week of va-

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2. Any registered Clerk or Longshoreman who has 25 qualifying years in the industry and is paid for 800 hours but less than 1344 hours in the preceding year, thus earning one week's vacation, shall receive an additional week of va-

cation. (Note: This leaves unaffected the 25-year man who works 1344 hours the previous year.)

Welfare

The Trustees of the Welfare Fund having determined that sound policy requires that a balance of $800,000 should be maintained (to meet two months' premiums covering existing benefits), it is agreed that at any time during the term of this Agreement that the Fund balance falls below $800,000 as the result of maintaining present benefits, an additional employer contribution of 1¢ per manhour shall be made for such period as may be required to replenish or maintain such balance. The Trustees shall determine the time during which such additional 1¢ shall be paid, based upon the status of the Fund with relation to the $800,000 balance formula.

Penalty Cargoes

The following commodities were added to the list of commodities carrying a 10 cent penalty:

1. Tapioca flour when sacks are leaking or sifting.
2. Calcine coke.
3. Freshly painted lumber when paint is wet.

[11] It was agreed also that during the coming contract year the parties will study the entire penalty list with the intent of revising it to eliminate commodities where packaging or mode of handling has changed so as to remove the obnoxious features. Any disagreements will be resolved at the June, 1960 contract review.

Protective Clothing and Devices

It was agreed that where protective clothing or devices are currently being furnished, even though not specifically

required by the safety code, the Employers will continue to furnish them. At the local level the parties will re-examine this question in order to arrive at an orderly procedure for the issuance, safeguarding, and return of the items furnished by the Employers.

Relief Periods

It is recognized that employees are entitled to reasonable and necessary time off for relief. Relief periods shall be arranged so as to fall around the mid-point of the work period involved, having due regard for the continuity and nature of the work. The ILWU agrees there shall be specific contract language to prevent the abuse of such relief periods or their being used as a subterfuge to operate as a 4-on — 4-gone practice, or variations thereof, and to insure that men will observe specified times for starting, resuming and finishing work.

Port Working and Dispatching Rules and Local Agreements

It was agreed, with regard to port working and dispatching rules that:

1) Any rules which conflict with or prevent the operation of the new contract provisions shall be changed.

2) Any other changes in port working and dispatching rules can be made only by mutual agreement.

With regard to local agreements with PMA or with PMA members (exclusive of Walking Boss Contracts) it was agreed:

a) That any provisions of the Coast Agreement which are applicable to the local agreements shall be incorporated in the local agreements.

b) That any provisions of the local agreements which are in conflict with the Coast Agreement shall be changed.

c) Any other changes in local agreements can be made only by mutual agreement.

[12] LEGAL QUALIFICATIONS

The Pacific Maritime Association has made the agreements on mechanization and the 8-hour guarantee contingent upon satisfactory resolution of certain tax and legal problems. This has been agreed to.

In connection with mechanization, the PMA needs to be assured that employer contributions to the one million five hundred thousand dollar ($1,500,000) Fund will be currently deductible for income tax purposes.

The PMA needs to be assured that the straight-time rate of pay is the regular rate under the Fair Labor Standards Act and there will be no obligation to pay overtime on overtime.

The Union has agreed to support the PMA in obtaining such assurances. Failure to obtain resolution of these problems would require renegotiation of these issues.

GOOD FAITH GUARANTEE

As an explicit condition of agreement, the parties exchanged commitments that the Agreement as amended will be observed in good faith. In answer to the Employers' demand for such a guarantee, the Union Negotiating Committee and Caucus unanimously voted to commit every local and every member to observe such commitment without resort to gimmicks or subterfuge. The Employers gave a similar guarantee of good faith observance on their part.

In order to implement this good faith guarantee, it was agreed that whenever the local grievance machinery

becomes stalled or fails to work the matter can be referred at once by either party to the Coast Labor Relations Committee for dispqsition. This understanding applies with special force to issues arising with regard to mechanization under Section 14 of the Coast Agreement and Section 25 of the Clerks' Agreement, and to the application of the 8-hour guarantee. Any problems arising over changes in local working or dispatching rules because of the new contract provisions can be thus referred to the Coast level for prompt disposition.

LENGTH OF CONTRACT

The contract shall be for a period of three years, terminating June 15, 1962, with an opening on wages, mechanization and hours in June, 1960; and an opening the second year, June, 1961, on wages, hours, mechanization and paid holidays. If settlement is not reached by negotiations, either party may submit unresolved issues to the Coast Arbitrator.

[13] (The Union has agreed without commitment on either side that there shall be discussions regarding the problems of domestic carriers.)

Dated: August 10, 1959

PACIFIC MARITIME ASSOCIATION
on behalf of its members

/s/ J. PAUL ST. SURE

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION
on behalf of itself and all Longshore and Marine Clerks Locals in California, Oregon and Washington

/s/ L. B. THOMAS

Exhibit 1-B

[1] (MEMORANDUM OF AGREEMENT
ON
MECHANIZATION AND MODERNIZATION
OCTOBER 18, 1960)

A. PROVISIONS FOR EFFICIENT OPERATIONS

1. (1) The Longshore and Clerk's Agreements and local agreements (exclusive of Walking Boss Agreements) shall be revised and amended in the manner set forth herein so as to eliminate restrictions in the contract and working rules, as well as in unwritten but existing Union unilateral restrictions and arbitration awards which interfere with the Employers' rights dealing with sling loads, first place of rest, multiple handling, gang sizes, and manning scales, so as to allow the Employers to:

a. Operate efficiently

b. Change methods of work

c. Utilize labor-saving devices

d. Direct the work through Employer representatives while explicitly observing the provisions and conditions of the Agreements protecting the safety and welfare of the employees and avoiding speed up. "Speed up" shall be understood to refer to an onerous workload on the individual worker. It shall not be construed to refer to increased production resulting from more efficient utilization and organization of the work force, introduction of labor-saving devices, or removal of work restrictions.

2. (2) It is the intent of this document that the contract, working and dispatching rules shall not be construed

so as to require the hiring of unnecessary men. The question of whether or not men are necessary shall be based on a determination of the number of men required to perform an operation in accordance with the provisions of paragraph A(1). Such determination shall take into account the contractual provisions for relief, the fact that during many operations all men will not be working at all times due to the cycle of the operation, but this shall not be construed to sanction such practices as four-on four-off or variations thereof.

3. The Employer may seek through the provisions of the contract machinery to change only those contract provisions, working and dispatching rules which are in [2] conflict with the provisions and intent of this document. Where changes are agreed upon at the Coast Committee level they shall go into effect. Where changes remain in dispute they shall be resolved by the contract machinery.

SLING LOAD LIMITS

4. *The sling load agreement shall be amended to provide as follows:*

5. 1. The sling load agreement shall continue to apply to all loads built by longshoremen where conditions, number of men on the dock and in the ship, and the method of operation are the same as when the sling load agreement was negotiated.

6. 2. In the case of all other commodities or operations where operations have changed or where new commodities or operations have developed, loads shall be as directed by the Employer, within safe and practical limits and without speed up of the individual. Any dispute arising with re-

gard to such operations shall be settled through the grievance machinery with the work continuing as ordered.

7. 3. An increase in the number of men man-handling cargo or the use of machinery to move or stow cargo on the dock or on the ship shall be considered a change in operations which permits the handling of loads larger than previous standards.

8. 4. Loads built by other than longshoremen or loads built by longshoremen under 2 or 3 hereof shall be skimmed or not skimmed as ordered by the Employer.

9. 5. Nothing herein limits the Union's right to raise the issue of onerousness of work through the grievance machinery.

PLACE OF REST AND MULTIPLE HANDLING

10. (1) There will be no multiple handling.

11. (2) Longshore work shall include the following dock work between the first and last place of rest (unless waived by the Union, in writing):

(a) High piling or breaking down high piles

(b) Sorting

(c) Movement of cargo on the dock or in a terminal, or to another dock, terminal or warehouse

(d) The removing of all cargo from longshore boards

[3] (e) The building of all loads on the dock.

12. The above work shall be performed when ordered by the Employer. Longshore work on the dock, as outlined in

this section, is left to the option of the Employer. The fact that such Employer option is provided for herein, does not require the Employer to perform such work, but Employers are hereby prohibited by this language from allowing others than Longshoremen to perform the work.

13. (3) If jurisdictional difficulties arise in the application of the above, whatever jurisdictional agreements are reached shall not result in multiple handling.

14. Section 1 of the Longshore Agreement, "Definition of Longshore Work", Paragraph (a) shall be amended by inserting the following language as a new paragraph following the words "companies parties to this Agreement.":

15. "The words 'first place of rest' in the preceding paragraph shall not be interpreted so as to require multiple handling of cargo on either discharge or loading operations or movement of cargo on the dock or in a terminal, or to another dock, terminal or warehouse, i.e., no cargo delivered to a terminal for loading on a ship, car or barge and no cargo arriving at a terminal by ship or barge and subsequently leaving a terminal shall require multiple handling by longshoremen except as required by the Employer.

16. "Cargo received on pallet, lift, or cargo boards, or as unitized or packaged loads, shall be considered as having fulfilled the 'first place of rest' requirement when unloaded from the carrier at a place designated by the Employer, and shall not be re-handled before moving to ship's tackle unless so directed by the Employer. Cargo received for shipment but neither palletized nor received as unitized or packaged loads and to be palletized before delivery to ship's tackle shall be palletized by longshoremen only (unless waived by the Union, in writing). Cargo discharged from a vessel on pallet, lift, or cargo boards or as packaged or

unitized loads shall be considered as having fulfilled the 'last place of rest' requirement, when it is dock stored just as it left the hatch. It may be removed by the consignee or his agent, without additional handling, unless de-palletizing is ordered or sorting is required by the Employer prior to such removal. After cargo has been placed on the dock after discharge from the vessel, any movement of the cargo to a railway car, any sorting on the dock, and any building of loads on pallet boards on the dock shall be done by longshoremen. This will permit the teamsters to load their trucks piece by piece from cargo boards after longshoremen have broken down piles and set loads to the tailgate, floor or loading platform.

[4] 17. "Longshoremen will load or discharge trucks only when directed to do so.

18. "High piling or breaking down high piles is longshore work. Outbound loads will be set down one lift high on the docks and then may be high piled only by longshoremen, if so required by the Employer. Inbound loads will be set down by longshoremen in lift loads suitable for placement on trucks."

GANG SIZES AND MANNING

19. Section 9 of the Pacific Coast Longshore Agreement, shall be amended to read as follows:

20. The minimum basic ship general break bulk cargo gangs shall consist of men as follows:

A gang boss (in ports where such are used)
A winch driver (two on single winches)
A hatch tender
Two (2) sling or front men
Four (4) holdmen (including siderunners)

Exhibit 1-B

21. Except as hereinafter provided: (1) On loading operations the basic gang can be the minimum number of men for all operations when the loads are being landed in the vessel at their place of rest or being stowed thereafter by mechanical equipment.

22. (2) On discharge operations this basic gang can be the minimum number of men when the loads are being moved to the point of removal from the vessel by mechanical equipment or are ready for slinging without additional handwork except the placement of slings or similar devices.

23. When cargo is to be hand-handled, then two swing men shall be added to the basic gang for all discharge operations, and four swing men shall be added for all loading operations. *Exception:* When space and safety are the factors that dictate that only one load can be handled at a time, prior to the handling of the second load, then the basic gang can perform such handling providing it is to last for one hour or more.

24. When the cargo handling operation to be performed requires only a minimum basic gang, that gang may be used to rig, uncover and cover hatches without additional men, so as to avoid deadtime under the eight hour guarantee.

25. The flexibility to apply to such swing men as are called for herein (and to the second winch driver) shall be the same flexibility set forth in the August 10, 1959 Memorandum in connection with the 8-hour guarantee. Swing men, skilled or unskilled, and the second winch driver, shall not be added to the basic gang complement in order to have ship's time guaranteed. They shall have the [5] 8-hour guarantee and the right to callbacks

without favoritism. They may be released at the end of any shift when they are not needed to start the next shift.

26. The minimums set forth above can be supplemented in any numbers as ordered by the Employer, while needed, without precedent.

27. Other longshore work in connection with loading and discharging is to be performed as ordered.

28. The Employer shall be permitted to bring machinery and machine drivers into the hold and to swing out an equivalent number of hold men, provided four basic hold men are retained at all times.

29. If loads above contractual limits are to be moved manually, and additional men or machines are required to guarantee against onerous individual workload, and to maintain safety standards, they will be provided.

30. Manning for existing operations shall continue with the Employer having the right to ask for review of such manning through the contract machinery in the following situations:

31. 1. Where existing manning for general cargo operations, including packaged lumber and mixed operations of break bulk and unitized cargo, (other than hand-handled operations) exceed the minimum basic ship general break bulk cargo gang; provided, however, that such review shall not seek to reduce the manning below said minimum basic ship gang, and shall be based on a determination of necessary men as hereinabove defined.

32. 2. In the case of other existing operations, such review shall be based on a determination of necessary men

as hereinabove defined, and shall not be limited by the minimum basic ship general break bulk cargo gang structure.

33. When new methods of operation are introduced the Employer shall discuss the proposed manning with the Union. If agreement cannot be reached (at the Coast level) the Employers shall have the right to put their manning in effect, subject to final resolution through the contract machinery.

[6] 34. In existing operations, where changed methods have already been introduced which eliminate hand-handling of cargo on a piece-by-piece basis; or which eliminate hand-handling of units (as in cases of straight runs of unitized cargo, mechanically landed, lifted and stowed and vice versa); or which eliminate the need for hold men by removal of devices, (as in the case of chutes in scrap operation), the procedure of this paragraph shall apply.

35. Dock gang units shall continue while providing for flexibility in the use of dock gangs.

36. The same safeguards with respect to speed up, safety and welfare shall apply in the case of gang size and manning as in the case of sling loads.

37. If, during a shift, a change is made from a discharge to a loading operation, and the change requires additional men under the provisions of this section, if the Employer is unable to swing in men from ship or dock from his own employees, the hold men will work without additional men for a maximum of fifteen loads but not more than one hour.

Exhibit 1-B

B. Modernization and Improvement Fund Provisions

38. In return for a revised Longshore and Clerks' Agreement incorporating the provisions set forth in Paragraphs A and C "Provisions for Efficient Operations", PMA will establish a jointly trusteed Fund as hereinafter provided. The administration and application of these revisions of the contract shall be subject to the grievance procedure at the Coast level.

39. 1. The Fund shall include the $1.5 million accumulated prior to June 15, 1960, and will be supplemented by PMA contributions of $5,000,000 per year for a period of five and one-half years. If at any time the maximum payments per year do not provide sufficient money to meet fully the guarantees and benefits, the guarantees and benefits shall be reduced proportionately.

40. 2. The Fund shall be segregated into two parts and used for the following purposes:

41. (a) For all present fully registered longshoremen and Clerks, minus attrition; a guarantee of payment for a specified number of hours of straight-time pay per week at the then current contract rate, computed on an annual basis. Such guarantee shall become operative only when hours fall below the agreed level due to reduced work opportunity resulting from changes as provided in Paragraph A hereof, but shall not apply to a drop in tonnage due to a decline in economic activity. Details of eligibility and administration to be negotiated.

[7]. 42. (b) For all present fully registered longshoremen and Clerks, minus attrition; the types of benefits pro-

vided in Union Draft of 10/4/60 Paragraph (2) (b), Paragraphs (1) to (7) inclusive. The amounts of such benefits to be determined by the Union. (See Exhibit "A", attached.)

43. In regard to the benefit entitled "Mandatory Pensioning", PMA-ILWU shall have joint control over application of early mandatory retirement. If the parties disagree, differences will be subject to arbitration.

C. General Provisions

44. 1. The parties agree that they will abide by all terms and provisions of the collective bargaining agreements.

45. 2. The parties agree that should disputes arise under these agreements all men and gangs shall continue to work as directed by the Employer in accordance with the specific provisions of the Agreements and that such disputes shall be settled through the grievance machinery of the applicable contract. Only in cases of bona fide health and safety issues may a standby be justified. The Union pledges in good faith that health and safety will not be used as a gimmick.

46. 3. The Union agrees that the provisions of Section 16(f) relating to "Penalties for Work Stoppages, Pilferage, Drunkenness and Other Offenses" shall be observed, and that in the event of disagreement as to the imposition of penalties under the "independent procedure" at the Joint Port Labor Relations Committee level, the issue shall be processed immediately through the grievance procedure, and to the Area Arbitrator, if necessary. The hearing and investigation of grievances relating to penalties shall be given precedence, on an equal basis with discharges, over

all other business before the Joint Port or Joint Area Labor Relations Committees and before the Area Arbitrator.

47. The Union further agrees that the provisions of Section 7 (b) (3) relating to removal of Hiring Hall personnel for cause shall be observed, and that any charges brought under this sub-section shall be processed through the grievance procedure immediately and shall be given precedence, on an equal basis with penalties and discharges, over all other business before the Joint Port and Joint Area Labor Relations Committees and before the Area Arbitrator.

[8] 48. 4. The parties agree the basic purposes of the Fund shall be specifically incorporated in the Trust Agreement and further that either party may on 60 days notice request a joint review of the basic purposes of the Fund no more than twice during the term of the Trust Agreement, and that the initial review may not be requested prior to a date 18 months subsequent to the effective date of the Trust Agreement. If the parties cannot reach agreement at these reviews, unresolved items or disputes may be referred to the Coast Arbitrator for decision at the request of either party.

49. 5. In connection with the Modernization and Improvement Fund PMA needs to be assured that the Employer contributions to the Fund will be currently deductible for income tax purposes.

50. The Union agrees to support PMA in obtaining such assurances from the proper government agencies. Failure to obtain resolution of these problems would require renegotiation of these issues.

51. 6. Any contract provisions, working rules, dispatching rules, unilateral rules or arbitrator awards in conflict

with the provisions of this document shall be nullified, or changed to the extent necessary, in order that they shall not prevent the operation of this Memorandum of Agreement. Any disputes concerning the interpretation or application of this Memorandum of Agreement shall be determined under Coast Labor Relations Committee procedures. The parties, by agreement, may refer proposed changes which are of local significance only, to the Local area for negotiation. In the interest of uniformity, any such matter negotiated at the Area level must be approved at the Coast level before being put in operation. Any matter referred to the Area level and not resolved within 30 days thereafter shall automatically return to the Coast level, and if not resolved there shall be presented to the Coast Arbitrator for decision.

52. 7. Wherever applicable the foregoing paragraphs shall apply equally to longshoremen and clerks. The provisions of 16(f) and 7(b)(3) of the Longshore Agreement shall be incorporated in the Pacific Coast Master Clerks' Agreement.

53. 8. In the event that the Union or any Local fails or refuses to follow a Coast LRC or Arbitrator's ruling interpreting or applying the provisions of this document, or in the event of a work stoppage in any port or ports in violation of the provisions of this document, payments into the Fund shall be abated during the period of such failure, refusal or stoppage in the manner and amount hereinafter provided, and the total Employer obligation shall be reduced by such amount.

[9] 54. The method of determining the amount of abatement shall be as follows:

> The total Employer obligation on an annual basis is at the rate of $13,650 per day. This shall be the

maximum amount of abatement per day. Within this limit, the parties shall agree as to the amount to be abated on a daily basis in each instance of failure, refusal or stoppage, whether on a Coastwide, Area, or Port basis, and failing such agreement, the Coast Arbitrator shall make such determination.

D. Duration

55. This Agreement shall become effective upon ratification by both parties and shall run to July 1, 1966.

E. Amendments to Basic Longshore and Clerks Agreements

56. 1. The present Basic Coast Longshore and Master Clerks Agreements shall be extended to July 1, 1966 subject to annual reviews on June 15. Either party may ask review of any item in the Agreements with the exceptions of Mechanization and Modernization and Pensions.

57. 2. The Coast Labor Relations Committee shall decide upon an equitable formula for dealing with the question of offenses which have arisen under Section 16(f) during the term of the present contract in order to prevent the unreasonable cumulation of penalties into the term of the Agreement as extended.

58. 3. The issue of gear priority shall be referred to the Coast Labor Relations Committee in order to develop a coastwise rule. The Committee shall take into account the positions advanced by both parties in the current negotiations. Pending agreement on such coastwise rule, existing local rules shall continue to apply.

Exhibit 1-B

59. 4. With regard to local agreements with PMA or with PMA members (exclusive of Walking Boss Contracts) it is agreed:

a) That any provisions of the Coast Agreement which are applicable to the local agreements shall be incorporated in the local agreements.

b) That any provisions of the local agreements which are in conflict with the Coast Agreement shall be changed.

c) Any other changes in local agreements can be made only by mutual agreement.

60. 5. Pensions are reviewable under the terms of the Pension Agreement on July 1, 1961.

[1] EXHIBIT "A"

Note: This language from the Union proposal of October 4. 1960 sets forth the *types* of benefits contemplated under paragraph B 2(b) of the October 18, 1960 Memorandum of Agreement. Specific wording will be incorporated in the Trust Agreement.

2. (b) *Early Retirement, with Vesting, and Death Benefit*: For all present fully registered longshoremen and clerks, minus attrition; the types of benefits provided below. The amounts of such benefits to be determined by the Union.

(1) A death benefit, after more than 5 and less than 15 years of pension credit service of $220 monthly for 12 monthly payments, to be paid to his beneficiary.

(2) After 15 years of pension credit service, accumulation of a vested right to a sum equal to 36 x 220, and at age

65, with 25 years or more of service, the right shall be fully vested. If such a man dies or becomes disabled prior to reaching pension retirement, he shall receive, or his beneficiary, a proportionate amount, depending on years of service beyond 15, or the amount provided in (1) or (6) hereof, whichever is greater but in case of death no more than $5,000.

(3) Normal retirement to continue at age 65 with 25 years of service, and with payment of lump sum equivalent in whole or on a monthly basis as preferred by the pensioner.

(4) *Voluntary Retirement* can be chosen at age 62 or thereafter with 25 years of service at the rate of $220 per month, and such early retirement will consume all or a part of a man's vested share of this Fund prior to his 65th birthday. Any residue of the individual share would be payable to the individual in a manner determined by him.

(5) *Mandatory pensioning* can be made obligatory at age 64, 63 or 62 with 24, 23, or 22 years of service and with the same payments as in (4) above plus normal pension payments, if such mandatory retirement is mutually deemed necessary for the purpose of reducing the work force. Such mandatory requirement would of course follow mandatory retirement of men with 25 years of service and 65 years of age but not yet 68. The parties shall have joint control over application of early mandatory retirement. If the parties disagree, differences will be subject to arbitration.

(6) *For men who die after 15 years of pension credit service and prior to retirement,* beneficiaries shall receive $5,000 in monthly payments of $220.

(7) *For men who die while on normal or early pension* prior to the exhaustion of their vested interest herein, beneficiaries shall receive the residue in monthly payments of $220 per month.

Exhibit 1-B

[1] MEMORANDUM OF UNDERSTANDING

BETWEEN

PACIFIC MARITIME ASSOCIATION

AND

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION

Pursuant to the wage review of June 15, 1960, it is hereby agreed:

WAGES

LONGSHORE

The basic straight-time wage rate for men paid on a 6-hour day basis shall be increased by 8 cents per hour effective 8 a.m., Monday, June 13, 1960. This brings the basic straight-time rate to $2.82 per hour and the overtime rate to $4.23 per hour.

For special categories of Longshoremen historically paid on an 8-hour straight-time basis, the basic straight-time rate shall be increased by 9 cents.

CLERKS

The straight-time rate for Clerks is increased by 10½ cents per hour, bringing the rate to $3.03½ straight-time and $4.55 overtime. (This is the increase applicable to Longshoremen on an 8-hour basis, plus 1½ cents.)

WELFARE

The Employers' contribution to the ILWU-PMA Welfare Fund shall be increased by 2 cents per manhour, bringing the contribution to 14 cents per manhour straight and overtime, effective 8:00 a.m., July 4, 1960, and shall be

further increased by one cent, to 15 cents per manhour, effective 8:00 a.m., January 2, 1961.

Dated: 10/18 1960.

For

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION
/s/ H. R. B.

For:

PACIFIC MARITIME ASSOCIATION

/s/ J. Paul St. Sure

oeiu 29
10/18/60

Exhibit 1-C

(ILWU-PMA Supplemental Agreement on Mechanization and Modernization, Dated November 15, 1961)

[1] ILWU-PMA SUPPLEMENTAL AGREEMENT

ON

MECHANIZATION AND MODERNIZATION

THIS AGREEMENT entered into as of the 1st day of January, 1961, by and between International Longshoremen's and Warehousemen's Union, representing employees, hereinafter defined, and on behalf of itself and all of its longshore and marine clerks' locals in California, Oregon and Washington, and Pacific Maritime Association, representing its member companies, hereinafter defined,

WITNESSETH:

WHEREAS, the parties hereto, after collective-bargaining negotiations, agreed on the terms and conditions to be incorporated in and amending the Pacific Coast Longshore Agreement and the Master Agreement for Clerks and Related Classifications, ratified January 10, 1961, and in and amending miscellaneous related agreements (*i.e.*, Agreement for Carloaders in San Francisco Bay, between the Association, as hereinafter defined, and International Longshoremen's and Warehousemen's Union Local 10; Agreement for Carloaders in Los Angeles Harbor Area between the Association and International Longshoremen's and Warehousemen's Union Local 13; Portland and Vancouver Dock Agreement between the Association [2] and International Longshoremen's and Warehousemen's Union Locals 8 and 4; Portland Gear and Lockermen's Agreement between the Association and International Longshoremen's and Warehousemen's Union Local 8; Dock Workers' Agree-

ment for Port of Seattle between Waterfront Employers of Washington, on whose behalf the Association is acting, and International Longshoremen's and Warehousemen's Union Local 19; and Sweepers Agreement for the Los Angeles-Long Beach Harbor Area between the Association and International Longshoremen's and Warehousemen's Union Local 13, all of which miscellaneous related agreements were also ratified January 10, 1961), including particularly those set forth in a written Memorandum of Agreement on Mechanization and Modernization between the parties hereto, dated October 18, 1960 (hereinafter referred to as "Memorandum Agreement"); and

WHEREAS, said Memorandum Agreement, and particularly Sections A and C thereof, contains various provisions for increasing efficiency in operations through permitting utilization of labor-saving devices and eliminating restrictive work practices in the Pacific Coast shipping industry, the substance of which provisions have been made an integral part of said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, and said miscellaneous [3] related agreements; and

WHEREAS, said Memorandum Agreement and particularly Section B thereof, contains other provisions for creating, accumulating and administering a so-called Mechanization Fund in the sum of Twenty-nine Million Dollars ($29,000,000) for the payment of certain benefits in consideration of the performance of said provisions for increasing efficiency in operations; and

WHEREAS, the parties hereto have now agreed upon the manner in which such Mechanization Fund is to be accumulated, administered and distributed and are desirous of formalizing such agreement,

Exhibit 1-C

Now THEREFORE, in consideration of the premises, the parties hereto agree as follows:

I. DEFINITIONS

The following terms where used in this Agreement, unless specifically provided to the contrary, shall have the following respective meanings and definitions:

1. *Union*: The International Longshoremen's and Warehousemen's Union, representing persons whose terms and conditions of employment as longshoremen or marine clerks, respectively, in California, Oregon and Washington, are governed by said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or any of said miscellaneous related [4] agreements, and including all of its longshore and marine clerks' locals in said states.

2. *Association*: Pacific Maritime Association.

3. *Member Companies*: Companies who are presently, or hereafter become, members of the Association and are, or become, subject to said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or any of said miscellaneous related agreements, or several of said collective-bargaining agreements, respecting the employment of "Employees" as that term is hereinafter defined in Section 4 of this Article 1.

4. *Employees*: All longshoremen or marine clerks and persons within related classifications who were on January 1, 1961, or during the term of this Agreement become, fully registered within the meaning and under the provisions of said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, respectively, and whose

terms and conditions of employment as longshoremen or marine clerks, respectively, in California, Oregon and Washington are governed thereby.

[5] 5. *Employers:*

(a) Companies who are Member Companies of the Association as of the date of this Agreement or thereafter become Member Companies of the Association and who employ directly Employees under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, any of said miscellaneous related agreements, or several of any of said collective-bargaining agreements.

(b) Companies who, although not Member Companies of the Association, employ directly any Employees, through any of the hiring halls jointly maintained by the Association and the Union, under arrangements mutually acceptable to the Association and the Union.

6. *Principals:* Member or non-Member Companies of the Association who do not employ directly Employees but who obtain stevedoring, terminal, or similar or related services under contracts with Employers in which services of Employees are employed.

7. *Companies:* Includes corporations, unincorporated associations, partnerships, joint ventures, estates, trusts and individuals.

8. *Contributions:*

(a) Assessments required of Employers [6] who are Member Companies under arrangements adopted by the Association, pursuant to its by-laws, in order to effectuate this Agreement;

(b) Appropriate charges required of Employers who are not Member Companies under arrangements established by and mutually acceptable to the Association and the Union.

9. *Mechanization Fund*: The fund to be created pursuant to Article II of this Agreement while in the possession of the Association.

10. *Vestees*: Employees who have established their eligibility pursuant to Schedule B hereof, or amendments thereto, for the vesting benefit available under the "Plan," as that term is hereinafter defined in Section 12 of this Article I.

11. *Agreement*: This ILWU-PMA Supplemental Agreement on Mechanization and Modernization.

12. *Plan*: This Agreement, the Trust Indentures and Trusts established thereby for implementation of the Agreement, the ILWU-PMA Welfare Fund to the extent the same is used in connection with this Agreement, and arrangements for assessment and charges for Contributions.

[7] II. Creation of Mechanization Fund

The Member Companies of the Association shall establish or cause to be established a Mechanization Fund in the following amount and manner:

1. *Amount and Rate of Accumulation.* Commencing January 1, 1961, and continuing for a period of five and one-half years ending June 30, 1966, a Mechanization Fund shall be established, subject to the provisions of Section

3 of Article V hereof, at the rate of Six Million Five Hundred Thousand Dollars ($6,500,000) during the first year, Five Million Dollars ($5,000,000) during each of the next four years, and Two Million Five Hundred Thousand Dollars ($2,500,000) during the next succeeding six months, for a total of but not exceeding Twenty-nine Million Dollars ($29,000,000).

2. *Contributions.* (a) Employers who are Member Companies shall make Contributions to the Mechanization Fund in the amounts and at the rates set forth in Section 1 of this Article II, and Principals who are Member Companies shall be responsible therefor to the extent the Association determines pursuant to its by-laws and in its sole discretion. As to Member Companies, the Association shall have and hereby reserves exclusive power to adopt and change the method, [8] manner and amount of collecting Contributions for the Mechanization Fund from Employers and to fix the responsibility therefor of Principals, provided that it may not, without consent of the Union, modify the annual rate at which the Mechanization Fund is to be accumulated as set forth in Section 1 of this Article II.

(b) Employers who are not Member Companies of the Association shall contribute to the Mechanization Fund at comparable rates and in a like fashion as other Employers under arrangements to which the Association and Union consent in writing; the amount of the Mechanization Fund to be accumulated by Member Companies under this Agreement shall be reduced by the amount to be contributed thereto under such arrangements by Employers who are not Member Companies, unless the Association and Union provide otherwise by written agreement acknowledged as being an integral part hereof.

(c) Nothing herein contained shall preclude any Employer from securing a guaranty from any Principal obtaining stevedoring, terminal, or similar or related services from such Employer under contract between such Employer and Principal, respecting the responsibility [9] of such Principal for any Contribution such Employer is obligated to pay hereunder on account of such services so furnished such Principal by such Employer.

3. *Interests in Mechanization Fund.*

(a) Neither the Union nor Employees shall have any right, title or interest, or any claim whatsoever, legal or equitable, in or to any portion of the Mechanization Fund.

[9] (b) No Trustee of any Trust employed for the effectuation of the Plan, or any beneficiary thereof, shall have any right, title or interest, or any claim whatsoever, legal or equitable, in or to any portion of the Mechanization Fund, except as is specifically set forth in and granted under this Agreement or any such respective Trust.

(c) The Association's status, including its right, title and interest, respecting the Mechanization Fund or any portion thereof, shall be only as a collecting agent for the various Employers making Contributions thereto for transferral to the respective Trusts, employed for effectuation of the Plan, of all or any portion of the Mechanization Fund coming into its possession in the form of Contributions.

[10] (d) No Employer, or its successor in interest, shall have any right, title or interest, or any claim whatsoever, legal or equitable, with respect to Contributions to the Mechanization Fund within the possession of the Association which were made by another Employer, and the interest of an Employer, or its successor in interest, in the Mechanization Fund shall be limited to that pro

rata portion thereof attributable to Contributions made by it, computed on a "first-in, first-out" principle, and which have not already been transferred by the Association to the respective Trusts employed for the effectuation of the Plan.

4. *Abatement.* (a) In the event that the Union or any persons represented by it (i) fails or refuses to follow any decision or ruling of the Coast Labor Relations Committee or any Arbitrator provided for in said Pacific Coast Longshore Agreement, Master Agreement for Clerks and Related Classifications, any of said miscellaneous related agreements, and this Agreement, interpreting, applying, or enforcing any provision of this Agreement (excluding the provisions of paragraph (b) of Section 1 of Article VI hereof) or of the provisions of [11] any of said collective-bargaining agreements which are specifically referred to in paragraph (c) of Section 1 of Article VI hereof, or (ii) engages in or permits a work stoppage in any port or ports covered by any of said respective collective-bargaining agreements in violation of any provisions of this Agreement (excluding the provisions of paragraph (b) of Section 1 of Article VI hereof) or the provisions of any of said collective-bargaining agreements which are specifically referred to in paragraph (c) of Section 1 of Article VI hereof, all payments of Contributions which Employers are otherwise obligated to make into the Mechanization Fund or to the Association, as collecting agent for such purpose, shall be abated during the period of any such failure, refusal or work stoppage in the manner and amount hereinafter provided in paragraph (b) of this Section 4 and the total obligation respecting such payments of Employers and Principals, as set forth in this Article II of this Agreement, shall be reduced by such amount, effective

concurrently with the period of any such failure, refusal or work stoppage.

[12] (b) It is mutually agreed for the purposes of this Section 4 of this Article II that on an annual basis said obligation accumulates at the rate of Thirteen Thousand Six Hundred Fifty Dollars ($13,650) per day, and it is mutually agreed that this sum shall be the maximum amount of the abatement allowable per day under paragraph (a) of this Section 4. In the event of any such failure, refusal or work stoppage, the Association and the Union shall promptly negotiate in an attempt to agree as to the amount, computed on a per diem basis, respecting each instance of any such failure, refusal or work stoppage, irrespective of whether any such event occurs on a Coastwide, Area or Port basis. If the Association and the Union after a reasonable period of negotiations fail to reach agreement on any such matter, the issue or issues in dispute may, at the request of either party hereto, be referred to arbitration for final decision under and in accordance with the provisions of Section 4 of Article VI hereof.

III. Function of the Association

1. *Status.* The Association shall be, and hereby is, appointed the collecting agent acting for and on behalf of Employers in accumulating [13] their respective Contributions to the Mechanization Fund, and the Association shall act as a conduit for transferring the whole, or portions, of the Mechanization Fund received by it to the respective Trusts employed for effectuation of the Plan as provided in this Agreement.

[13] 2. *Limitation.* The Association shall not commingle Contributions by Employers to the Mechanization

Fund with the Association's general funds or any other funds or trusts within its possession, and the Association shall not act as a repository of Contributions by Employers to the Mechanization Fund beyond such time as may be reasonably necessary to perform accounting and banking transactions required for effectuation of the Plan with due regard for the respective tax years of Employers who have made such Contributions.

3. *Authority.* The Association is hereby authorized to act as such collecting agent for Employers and, as such, to take all reasonable action necessary to compel Employers and Principals who are Member Companies to comply with their respective obligations or responsibilities under the Plan.

[14] 4. *Default.* (a) In the event of an Employer's default in making its Contributions required under the Plan, the Association shall report such default to the Union and certify the extent of such default to the Trustees of the Trusts to be employed pursuant to Article IV hereof.

(b) In the case of such a default by an Employer who is not a Member Company of the Association, such Employer shall be denied further use of any of the dispatching halls jointly maintained by the Association and the Union, and any other facilities maintained under said Pacific Coast Longshore Agreement, Master Agreement for Clerks and Related Classifications, or any of said miscellaneous related agreements, until such default is corrected; the Union and the Association shall take all reasonable and available steps to compel either an Employer or a Principal who is not a Member Company to comply with its obligations under the Plan; and neither Member Companies, the Association, nor the Union shall be liable or responsible to make good losses incurred by reason of any such default.

(c) In the case of any such default [15] under the Plan by an Employer who is a Member Company and a failure by the Association after a reasonable period to compel such Employer to correct such default, the Trustees of the respective Trusts to be employed pursuant to Article IV hereof shall be empowered and authorized in their name and capacity to commence and pursue such legal remedies as may be appropriate and available to enforce whatever rights under the Plan they may have in the premises against such Employer. In a like manner said Trustees shall be empowered and authorized to proceed in the case of any default under the Plan by an Employer or Principal who is not a Member Company and a failure by the Union and Association after a reasonable period to compel such Employer or Principal to correct the default.

(d) Principals shall be responsible for assuring themselves that any and all moneys paid by them under the Plan to Employers are in turn paid as Contributions by such Employers to the Association as collecting agent, and if any such Principal is a Member Company, any responsibility it may have under this Agreement in such connection shall not be satisfied until [16] such Contribution is received by the Association as collecting agent.

(e) The Association agrees to undertake to collect the obligations owed by any defaulting Employer who is a Member Company hereunder (including the institution of legal action which the Association is hereby empowered to undertake), and if the Association fails, the remaining Member Companies of the Association shall be required to make good any loss resulting from the default of such Employer.

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IV. Administration of Mechanization Fund

1. *Establishment of Trusts.* The benefits described in Article V and Schedules A, B and C hereof, shall be made available to Employees eligible therefor as beneficiaries of three separate, independent and irrevocable Trusts, as follows:

(a) Death and Disability Benefits. (1) Death and disability benefits described in Article V hereof and the attached Schedule A and any amendment thereto, shall be made available to eligible Employees under the Declaration of Trust of the ILWU-PMA Welfare Plan, as amended, which Plan and Trust established thereunder have been, or shall [17] be, amended by the Union and Association to the extent necessary to implement this Agreement.

(2) The Association, as collecting agent for Employers, shall from time to time transfer from Contributions received by it for the Mechanization Fund to the Trustees of the ILWU-PMA Welfare Fund, as so amended, sufficient moneys for the purpose of providing for the death and disability benefits provided for by said Article V, Schedule A, and any amendment thereto.

(b) *Vesting Benefit.* (1) The Vesting Benefit described in Article V hereof and the attached Schedule B, and any amendment thereto, shall be made available to Employees eligible therefor under an irrevocable trust established by the Association and Union under the laws of the State of California to be known as the ILWU-PMA Vesting Benefit Trust, which Trust shall be administered by six (6) Trustees, three (3) of whom shall be designated by the Union and a like number by the Association, who [18] shall be empowered to discharge their responsibilities under the Plan.

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(2) The Trustees of said Trust shall maintain lists of Vestees and shall regularly and periodically report to the Association during each calendar year while the Plan is in effect the extent of the Trust's monthly obligations to the Vestees and designees.

(3) The Association as collecting agent for Employers, shall transfer from Contributions received by it for the Mechanization Fund to said Trustees only such moneys as are necessary to enable them to discharge obligations owed to Vestees and designees, to pay for necessary and reasonable administration expenses which have been incurred by said Trustees in administering the ILWU-PMA Vesting Benefit Trust and to pay taxes as hereinafter provided. The Association shall not, in any event, transfer from the Mechanization Fund any moneys to the Trustees of the ILWU-PMA Vestng Benefit Trust, which are not [19] required by said Trustees for immediate payment of such obligations, administration expenses or taxes which are currently due and owing by said Trustees.

(4) Upon receipt of such moneys from the Association, said Trustees shall immediately use the same for payment of such obligations, administration expenses or taxes which are currently due and owing by said Trustees.

(c) *Supplemental Wage Benefit.* (1) The Supplemental Wage Benefit, described in Article V hereof and the attached Schedule C and any amendment thereto, shall be made available to Employees eligible therefor under an irrevocable trust established by the Association and Union under the laws of the State of California to be known as the ILWU-PMA Supplemental Wage Benefit Trust, which Trust shall be administered by six (6) Trustees, three (3) of whom shall be designated by the Union and a like number by the Association, who shall be empowered to discharge their responsibilities under the Plan.

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[20] (2) The Association, as collecting agent for Employers, shall transfer promptly from Contributions received by it for the Mechanization Fund to the ILWU-PMA Supplemental Wage Benefit Trust, moneys to be held, administered and used for the payment of supplemental wage benefits to Employees eligible therefor, as set forth in Article V hereof and the attached Schedule C, and any amendments thereto and for payment of administration expenses and taxes as hereinafter provided.

2. *Interests in Trusts.* (a) The transfer of moneys from the Mechanization Fund by the Association to the Trustees of the ILWU-PMA Welfare Fund, ILWU-PMA Vesting Benefit Trust, or ILWU-PMA Supplemental Wage Benefit Trust, respectively, shall be final and irrevocable, and neither the Association, any Employer, any Principal nor the Union shall have any right, title or interest, or any claim whatsoever, legal or equitable, in any moneys so transferred.

(b) No Employee or beneficiary, or their designees, of any of said Trusts shall have any right, title or interest, or any claim whatsoever, [21] legal or equitable, in or to the funds so transferred from the Mechanization Fund to the ILWU-PMA Welfare Fund, ILWU-PMA Vesting Benefit Trust, or ILWU-PMA Supplemental Wage Benefit Trust, respectively, except as provided in paragraphs (c), (d) and (e) of Section 2 of this Article IV.

(c) Employees, or their designees, eligible under this Agreement for death or disability benefits provided by this Agreement shall be entitled, upon compliance with the procedures established by the Trustees of the ILWU-PMA Welfare Fund in connection with the payment of benefits generally available under said Fund, to obtain payment of death or disability benefits in the amount provided by this

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Agreement and to the extent that the Association has transferred, or arranged for transfer of, such moneys from the Mechanization Fund to such Trustees; each such Employee, or his designee, shall be limited to enforcing his rights under the Plan by proceeding against said Trustees and the ILWU-PMA Welfare Fund.

(d) The interests and rights of each Vestee, or his designee, in such moneys transferred from the Mechanization Fund in accordance with the request of the Association by the Trustees of [22] the ILWU-PMA Vesting Benefit Trust for payment of obligations owed thereunder to Vestees and designees shall be limited to such Vestee's or designee's pro rata share thereof, and each Vestee, or his designee, shall be limited to enforcing his rights under the Plan by proceeding against said Trustees and the ILWU-PMA Vesting Benefit Trust.

(e) Employees eligible under this Agreement for supplemental wage benefits provided by this agreement, upon compliance with the procedures to be established by the Trustees of the ILWU-PMA Supplemental Wage Benefit Trust in connection with the payment of said benefits, shall be entitled to obtain payment of said benefits, and each such Employee shall be limited to enforcing his rights under the Plan by proceeding against said Trustees and the ILWU-PMA Supplemental Wage Benefit Trust.

(f) Any Employee or designee of an Employee or Vestee, who is ineligible to receive a death, disability, vesting, or supplemental wage benefit shall have no rights or claims against any of the aforesaid Trusts, Trustees thereof, the Association, its Member Companies, the Union, or any of the officers, members, or agents of any of them.

(g) The interests of the Trustees of each of the aforementioned Trusts shall be limited [23] to the property under their respective administrations and shall not extend

to that property which is subject to another Trust for payment of the benefits provided under such other Trust.

3. *Limitations on Liability.* Neither the Association, any Employer, any Principal, nor the Union shall be liable or responsible for any losses, occasioned by misdelivery to, or misuse by, or misfeasance of any Trustee of any of said respective Trusts, of moneys transferred to such Trustees by the Association, notwithstanding that the moneys available to any such Trust from the Mechanization Fund will be insufficient for payment of the benefits under the Plan.

4. *Arbitrator.* Each of the aforementioned Trusts shall contain provisions for the appointment of an impartial Arbitrator to resolve whatever deadlocks, if any, may occur between the Trustees from time to time, as required by the Labor Management Relations Act, as amended.

5. *Powers and Duties of Trustees.* (a) The Trustees of each of the aforementioned Trusts may demand payment by the Association from Contributions received by it for the Mechanization Fund of such moneys to which the Trusts under their respective administrations may be entitled under [24] this Agreement and may proceed at law or equity to enforce such demand if the Association fails to make any such payment within a reasonable period.

(b) The Trustees of each of said respective Trusts are hereby empowered to enforce the rights derived hereunder by the Trust under their respective administrations against any Employer or Principal to the extent that the Association certifies to such Trustees that an Employer or Principal is in default of its obligations or responsibilities under the Plan, and such Trustees may proceed at law or equity or under the bankruptcy laws to enforce such rights.

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(c) The Trustees of each of the aforementioned Trusts shall be authorized to employ the services of an Administrator to the extent such respective Trustees deem such services necessary.

(d) The Trustees of each of the aforementioned Trusts shall make, or cause to be made, all reports required of such Trustees and any Administrator employed by them, the Union, the Association, Principals, Employers or of any of their agents, officers and representatives under the Labor Management Relations Act, as amended, Labor Management Reporting and Disclosure Act of 1959, The Welfare and Pension Plans Disclosure [25] Act, and the laws of the State of California.

(e) The Trustees of each of the aforementioned Trusts shall make, or cause to be made, all reports of payroll and withholding taxes required by reason of disbursements from the Trusts under their respective administrations. The Trustees shall pay all such taxes directly, or, to the extent governing law requires that such reports and taxes be made or paid by an Employer, said Trustees shall provide such Employers with the necessary information for such reports and with moneys from their respective Trusts for payment of such taxes for which Employees are primarily liable, and the Association shall provide such Employers with moneys from the Mechanization Fund for payment of such taxes for which Employers are primarily liable.

(f) The Trustees of each of the aforementioned Trusts shall maintain or cause to be maintained, or provide Employers with information for making and maintaining, all records required under the Fair Labor Standards Act, as amended, and any other law of the United States or the State of California applicable to the Plan.

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V. BENEFITS

1. *Utilization of Fund.* (a) Subject to the [26] provi sions of paragraphs (b) and (c) of this Section 1 of Article V, the moneys transferred from the Mechanization Fund by the Association to said respective Trusts shall be used to provide the death and disability benefits described in Schedule A hereof; to provide the vesting benefits described in Schedule B hereof, and to provide the supplemental wage benefits described in Schedule C hereof to Employees, or their designees, who are respectively eligible therefor in accordance with the provisions set forth in each of the said respective schedules and who comply with the procedures adopted by the Trustees of each of said respective Trusts in connection with the administration of their Trusts, subject to any amendment to this Agreement or said schedules which are adopted by the parties hereto pursuant to this Agreement.

(b) The respective Trustees of the ILWU-PMA Welfare Fund, ILWU-PMA Vesting Benefit Trust, and ILWU-PMA Supplemental Wage Benefit Trust may also use the moneys transferred by the Association from the Mechanization Fund to their respective Trusts for the payment of administration expenses of their respective Trusts or of any taxes attributable to benefits paid under their respective Trusts.

(c) The Association, on account of the respective Employers, may use that portion of the [27] Mechanization Fund required for payment of such payroll taxes as the respective Employers may incur either by reason of transfer by the Association of their respective Contributions to the Mechanization Fund to any of the Trusts employed to effectuate the Plan or by payment of benefits by said Trusts.

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2, *Allocation of Fund.* (a) Unless otherwise mutually agreed in writing by the Association and Union and subject to the provisions of paragraphs (b) and (c) of Section 1, and the provisions of Section 3, of this Article V, a total of at least Eleven Million Dollars ($11,000,000) of the Mechanization Fund shall be allocated during the term of the Plan to the ILWU-PMA Supplemental Wage Benefit Trust to provide for the supplemental wage benefits described in said Schedule C or any amendment thereof; said sum shall be accumulated at the rate of Two Million Dollars ($2,000,000) per year, unless the remaining portion of the Mechanization Fund available in any year for payment of vesting benefits then due and owing Vestees under the Plan is insufficient therefor, in which case said rate for accumulation of said sum may be lower for such year provided the parties hereto shall, as required by the provisions of paragraph (c) of this Section 2 of Article V hereof, make appropriate provision for the accumulation during [28] the term of the Agreement from Contributions to the Mechanization Fund of said total sum of Eleven Million Dollars ($11,000,000). Subject to the provisions of paragraphs (b) and (c) of Section 1, of paragraphs (b) to (d), inclusive, of this Section 2, and of Section 3, of this Article V, the remainder of the Mechanization Fund shall be used to provide for the death and disability benefits or vesting benefits, or both, respectively described in said Schedules A and B, or any amendments thereof.

(b) No portion of the Mechanization Fund shall be transferred to the Trustees of the ILWU-PMA Vesting Benefit Trust except such portion which may be required by such Trustees for immediate payment of vesting benefits due and owing to Vestees and designees, current administration expenses or applicable withholding or payroll taxes, or both.

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(c) Whenever it should appear to either party hereto that the total sum of Eleven Million Dollars ($11,000,000) to be allocated for supplemental wage benefits will not be accumulated during the term of the Agreement from Contributions by Employers to the Mechanization Fund if death and disability benefits and vesting benefits are continued in the amounts then provided by said Schedules A and B, or any amendment thereto, then, to whatever [29] extent is necessary to assure said accumulation, the benefits provided for in Schedule A shall first be decreased, deferred or eliminated in their entirety and thereafter the benefits described in Schedule B shall be decreased, deferred or eliminated in their entirety, as the Union and Association in each such instance may agree; provided, however, a Vestee, or his designee, who has not received full payment of the amount of the vesting benefit available under the Agreement and Schedule B hereof as of the date such Vestee removed, or was compelled to remove, himself from the active work force shall be entitled to full payment thereof; the designee of an Employee who has not received full payment of the death benefit available under the Agreement and Schedule A hereof as of the date such Employee retires and qualifies therefor shall be entitled to full payment thereof; or an Employee, or his designee, who has not received full payment of the disability benefit available under said Schedule A as of the date such Employee is classified as totally disabled shall be entitled to full payment thereof; provided, further, said unpaid portion of vesting benefit, death benefit, or disability benefit, as the case may be, may not be decreased or eliminated unless there will be insufficient moneys accumulated by [30] Contributions from Employers to the Mechanization Fund, pursuant to the provisions of Section 2 hereof, in which case all said unpaid portions shall be appropriately decreased, and eliminated, if necessary, to equalize the total benefits pay-

able to such Vestees, designees, or Employees, respectively, but such Vestee, designee or Employee shall never be required to repay any benefit or portion thereof theretofore paid in accordance with the Plan.

(d) Member Companies shall not, in any such event, be required to increase the amount of Contributions to, or accelerate the rate of accumulation of, the Mechanization Fund.

3. *Reallocation and Extension.* (a) If it appears to the Association from the regular and periodic reports required by it of the Trustees of the ILWU-PMA Welfare Fund and the ILWU-PMA Vesting Benefit Trust as to the immediate and projected needs of their respective Trusts for sufficient moneys to provide benefits then available under such respective Trusts in accordance with the Plan, that the portion of the Mechanization Fund allocated under Section 2 of this Article V during any calendar year to provide for death and disability benefits or vesting benefits, or both, will exceed such needs of either or both of said Trusts, then the Association [31] in its sole, absolute and unreviewable discretion, may during such calendar year either (1) decrease the annual rate at which the Mechanization Fund is to be accumulated pursuant to Article II hereof notwithstanding the provisions of paragraph (a) of Section 2 thereof, or (2) transfer to the ILWU-PMA Supplemental Wage Benefit Trust such excess portion of the Mechanization Fund accumulated during such calendar year, unless the Association has theretofore transferred from the Mechanization Fund to said Trust pursuant to the terms of this Agreement a total of Eleven Million Dollars ($11,000,000), in which case the Association, only with the concurrence of the Union and subject to the provisions of paragraph (b) of this Section 3 of Article V, may transfer from the Mechanization Fund said excess portion to the

ILWU-PMA Welfare Fund for use by the Trustees to provide any of the benefits available under the ILWU-PMA Welfare Plan or to the ILWU-PMA Supplemental Wage Benefit Trust.

(b) Notwithstanding any other provision of this Agreement, when it appears to the Association, that vesting benefits will be payable, subsequent to June 30, 1966, to Employees, or their designees, becoming Vestees on or before said date, then the Association may decrease the annual rate [32] at which the Mechanization Fund is to be accumulated pursuant to Article II hereof by such amount and for such year or years as the Association in its sole, absolute, and unreviewable discretion determines is necessary to allow future accumulations, as hereinbelow provided, for payment of such vesting benefits to such Vestees, or their designees, and the Association shall, subsequent to June 30, 1966, as moneys are required by the ILWU-PMA Vesting Benefit Trust for payment of such vesting benefits, accumulate the same by Contributions of Employers to the Mechanization Fund for transfer to said Trust, pursuant to the terms of this Agreement.

(c) Neither the provisions of paragraph (a) nor (b) of this Section 3 of Article V shall be construed as requiring the Member Companies to accumulate under this Agreement more than a total of Twenty-nine Million Dollars ($29,000,000) in the Mechanization Fund or as relieving the Member Companies from accumulating in the Mechanization Fund less than said total sum and, if said total sum has not been accumulated and transferred to the respective Trusts to be employed for effectuation of the Plan by June 30, 1966, or when payment of the last vesting benefit to a Vestee, or his designee, has been made or provided for hereunder, whichever [33] date is later, the balance of said total sum shall be accumulated in the

Mechanization Fund and used as the Union and Association may then mutually agree.

(d) Whenever conditions require the Association to exercise the powers granted to it by this Section 3 of Article V hereof, the Association shall at all times inform the Union as to the provisions which the Association intends to make or has made to provide for the collection in the future of such portion of the annual Contributions to the Mechanization Fund which has been deferred by reason of exercise of the powers granted to the Association by this Section 3.

4. *Restriction on Use.* If the portions of the Mechanization Fund transferred to the respective Trustees of the ILWU-PMA Welfare Fund and of the ILWU-PMA Supplemental Wage Benefit Trust have not been expended during the term of this Agreement for the benefits provided for under said respective Trusts, the balance of either or both of said respective Trusts shall be used in such manner as the Association and Union mutually agree in writing, but no part of either said balances shall inure to the benefit of the Union, Association, Employers or Principals, and said balances shall be used only to provide comparable benefits to Employees, their [34] families or dependents, in accordance with the basic intent and purpose of the Plan, subject to a prior determination by the Internal Revenue Service that tax consequences attendant with such use are consistent with or are not substantially different than those set forth in the rulings affecting the Plan which were theretofore obtained.

VI. General Provisions

1. *Integration of Agreements.* (a) The provisions of Section B and applicable provisions of Paragraphs 1, 4, 5,

6, 7 and 8 of Section C of said Memorandum Agreement are hereby acknowledged as being incorporated in this Agreement and all other provisions of said Memorandum Agreement are hereby acknowledged to have been incorporated in said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, said miscellaneous related agreements, or several of any of said collective-bargaining agreements. Accordingly, said Memorandum Agreement has been superseded in the manner indicated and shall no longer have any force and effect.

(b) The Association and the Union agree that they will abide by all terms and provisions of said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, [35] and said miscellaneous related agreements.

(c) The Association and the Union each, on behalf of itself and the respective parties represented by it, agree that the provisions of said Memorandum Agreement identified in paragraph (a) of this Section 1 of Article VI as not being incorporated in this Agreement but as having been incorporated in said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, said miscellaneous related agreements, or several of any of said collective-bargaining agreements, are an integral part of this Agreement, the violation of which by the Union and said parties represented by it shall constitute a violation of this Agreement entitling the Association to invoke the Abatement provision as set forth in Section 4 of Article II hereof.

2. *Incorporation.* Schedules A, B and C hereof, and any subsequent amendments thereof, are incorporated in this Agreement as integral parts hereof; are to be construed and applied consistently with the other provisions

hereof; and terms used therein shall have the same meaning as similar terms used herein.

3. *Amendment and Review.* Except as expressly provided in this Agreement, the Union and Association by their mutual agreement in writing may at any time [36] amend, modify or delete any provisions of this Agreement or of the Trusts to be employed to effectuate the Plan. Further, either the Union or Association may, each, on not more than two occasions during the term of this Agreement, but not before July 1, 1962, request a review of the basic purposes of the Plan and propose modifications thereto, and, if said parties are unable to agree as to such modifications after a reasonable period of negotiations, either party may request the issue or issues in dispute to be referred for final decision to the Coast Arbitrator, or other Arbitrator appointed in accordance with the provisions of Section 4 of this Article VI; provided that, the provisions of Section 1 of Article II hereof, relating to the total amount of the Mechanization Fund and the annual rate of accumulation thereof, of Section 4 of Article II hereof, relating to abatement of Contributions, and of Section 2 of Article V hereof, relating to the allocation of a minimum of Eleven Million Dollars ($11,000,000) of the Mechanization Fund to the ILWU-PMA Supplemental Wage Benefit Trust, shall not be subject to review, modification or arbitration except by mutual agreement of the parties hereto.

Nothing contained in this Section 3 of Article VI shall authorize or permit a modification of the [37] provisions of Section 2 of Article IV hereof. The Plan may not be modified so as to require repayment by any Employee or designee of any benefit paid to an Employee or designee by Trustees pursuant to the terms and conditions of the Plan in effect as of the date of such payment.

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4. *Arbitration.* Unless the parties hereto mutually agree on a different method for resolution of the same, all questions, disputes and other issues arising under the Agreement shall be resolved in accordance with the provisions of this Section 4 of Article VI, which provides the exclusive remedy for determination of such questions, disputes, and other issues.

Such questions, disputes or other issues shall be determined in accordance with the grievance procedures contained in said Pacific Coast Longshore Agreement or Master Agreement for Clerks and Related Classifications, whichever may be applicable, commencing at the level of the Coast Labor Relations Committee and terminating with arbitration before the Coast Arbitrator as therein provided. If the parties to said collective-bargaining agreements have failed to agree upon the Coast Arbitrator thereunder so that said office is vacant, or, if the Coast Arbitrator shall at any time be unable or refuse or [38] fail to act, or shall resign, then the parties hereto shall promptly agree upon another Arbitrator to resolve such question, dispute, or issue; if the parties hereto fail to agree upon another Arbitrator, he shall be appointed at the request of either party by Mr. E. D. Conklin; but, if another Arbitrator is not appointed by agreement of the parties or Mr. E. D. Conklin within a reasonable time, either of the parties hereto may apply to the United States District Court for the Northern District of California, Southern Division, for appointment of such other Arbitrator.

Said Coast Labor Relations Committee, Coast Arbitrator, or other Arbitrator, shall have primary and exclusive jurisdiction over all such disputes, questions, or issues and shall decide the same under and in accordance with the terms and conditions of the Plan, including those of this Agreement and said Trusts and compatibly and con-

sistently with the tax rulings and tax consequences set forth in Section 6 of this Article VI. The decision of the Coast Arbitrator, or other Arbitrator, shall be final and binding as to all questions, disputes and issues within his jurisdiction.

Notwithstanding any other provision of this Agreement, said Coast Labor Relations Committee, the Coast Arbitrator, or other Arbitrator, shall [39] not have jurisdiction over (1) questions, disputes, or issues arising under a Trust for which a procedure is provided by such Trust for resolution of the same; (2) any question, dispute or issue involving the exercise of sole, absolute and unreviewable discretion or of exclusive powers reserved to a party hereto or the Trustees of the said Trusts; and (3) questions, disputes or issues involving an increase of the total amount of the Mechanization Fund, or Contributions thereto, or an acceleration of the annual rate of accumulation thereof.

Nothing contained in this Section 4 of Article VI shall preclude the Trustees of the said Trusts from enforcing their respective rights under the Plan by proceedings in a court of law, equity, or bankruptcy, and, in particular, from instituting legal remedies against an Employer certified by the Association as being in default of its obligations under the Plan.

5. *Modifications of Bargaining Unit.* In the event any group or groups of Employees whose terms and conditions of employment are presently governed by said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or any of said miscellaneous related agreements, withdraw from the respective bargaining unit [40] or units covered thereunder and said respective collective-bargaining agreements no longer govern terms and conditions of their employment, the con-

sequences to the Plan of any such occurrence shall be reviewed by the parties hereto and appropriate amendments to the Plan, providing for the exclusion of such Employees from further benefits under the Plan and for an appropriate and commensurate pro rata reduction in future Contributions to the Mechanization Fund by Employers, shall be subjects for negotiation between the parties hereto.

6. *Tax Rulings.* The parties hereto have entered into this Agreement and established the various Trusts provided for hereunder in reliance on the letter rulings dated September 15, 1961, of the Internal Revenue Service, and on their applicability to all Member Companies, to the effect that the Employers may take a tax deduction from gross income for their respective Contributions paid to the Association for the Mechanization Fund effective with the transfer by the Association from the Mechanization Fund of the same to the respective Trusts to be employed for effecuation of the Plan, and to the effect that Principals may take a tax deduction from gross income for payments made by them to Employers on account of such Contributions in the year such payments are made or the responsibility to make such payments [41] is incurred. If either of said tax consequences is defeated or nullified by construction, amendment, revision, or revocation of said rulings or by any other event whatsoever, the obligations under Article II hereof of the Association and its Member Companies to continue to accumulate the Mechanization Fund and of Employers to pay further Contributions to the Mechanization Fund shall be immediately suspended and the Association may make appropriate refunds to the respective Employers of their Contributions then held by the Association in the Mechanization Fund. Such obligations shall not be revived until and unless during the term of this Agreement the Member Companies

shall have obtained a further effective ruling of the Internal Revenue Service reaffirming said tax consequences or until and unless an equivalent effective assurance of said tax consequences is obtained, either or both in a form satisfactory to the Association in its sole, absolute and unreviewable discretion. The Union agrees to assist the Association and Member Companies in obtaining such further ruling or equivalent assurance.

Further, the parties hereto recognize that rulings by the Internal Revenue Service respecting the reporting and payment of withholding and payroll taxes will be required, and, pending receipt of such rulings the Association in administering the [42] Mechanization Fund and the Trustees in administering their respective Trusts provided for herein shall establish appropriate reserves, consistent with the provisions of this Agreement, for such taxes for which either the Employers or Employees may be primarily liable, and all such respective taxes shall be paid, directly or indirectly, from the Mechanization Fund or the respective Trusts, as the case may be, as provided in Article IV hereof.

7. *War or National Emergency.* In the event of declaration of war by the United States or hostilities involving the Armed Forces of the United States or other national emergency and a resultant requisitioning by the United States of title or use of a substantial number of vessels owned or operated by Member Companies, the obligations of the Association and its Member Companies under Article II hereof shall be automatically and immediately reviewed as a subject of negotiations between the parties hereto.

8. *Equal Responsibilities of Employers.* Employers who are not Member Companies and who desire to par-

ticipate in this Plan shall do so only by entering into arrangements hereunder acceptable to the Association and Union.

9. *Legality.* It is hereby expressly recognized by the Union that the Association and its Member Companies in entering into this Agreement are relying [43] on rulings which have been obtained or are in the process of being obtained to the effect that for purposes of the Fair Labor Standards Act, as amended, no part of any Contributions shall be included in the regular rate of wages of any Employee, and if said rulings are not obtained, or, if obtained, are defeated or nullified by construction, amendment, revision or revocation of said rulings or by any other event whatsoever, or, in the further event any portion of the Plan is held unlawful under any law by decision of any court, the obligations under Article II hereof of the Association and its Member Companies to continue to accumulate the Mechanization Fund and of Employers to pay further Contributions to the Mechanization Fund shall be immediately suspended and the Association may make appropriate refunds to the respective Employers of their Contributions then held by the Association in the Mechanization Fund. Such obligations shall not be revived until and unless during the term of this Agreement the Member Companies shall have obtained a further effective ruling or further effective assurances reaffirming said rulings under the Fair Labor Standards Act, as amended, or a further court decision by an appellate court reversing the decision as to the unlawfulness of the Plan, such further ruling or assurances to be in a form satisfactory [44] to the parties hereto. The Union agrees to assist the Association in obtaining all rulings, assurances or court decision.

Exhibit 1-C

10. *Governing Law.* This Agreement and the Plan shall be governed by and construed under the laws of the State of California, and it is hereby acknowledged that the parties hereto have jointly undertaken to draft and prepare the form of the same. The titles and subtitles used in this Agreement are not a part of this Agreement, are included solely for convenient reference to the respective articles and sections hereof and have no bearing upon the interpretation of any terms and provisions hereof.

11. *Termination of Agreement.* Except as specifically provided in Section 3 of Article V hereof, the Association and Member Companies shall in no event be required by this Agreement or the Plan to agree to continuance of the whole or any part of the Plan for an additional term of years, or to continue making provision for payment of vesting benefits following the termination of this Agreement to any Employee, or designee, who does not become a Vestee before July 1, 1966, or for payment beyond said date of any other benefit provided by the Plan. The Agreement shall run concurrently with said Pacific Coast Longshore Agreement and Master Agreement for Clerks and Related Classifications, [45] ceasing therewith, until July 1, 1966, or to such later date as is required for the sole purpose of effectuating the provisions of Section 3 of Article V hereof.

Executed this 15th day of November, 1961.

FOR THE ASSOCIATION:

/s/ J. PAUL ST. SURE.

FOR THE UNION:

/s/ HARRY BRIDGES.

Exhibit 1-D

[1] (SCHEDULE A
DEATH AND DISABILITY BENEFITS)

1. DISABILITY BENEFITS.

(a) An Employee shall be eligible to receive monthly disability benefits commencing on or after July 1, 1961, upon meeting each of the following requirements:

(1) He is, and was, for the nine calendar years immediately preceding the event qualifying him for a disability benefit, fully registered under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, and makes himself regularly available for work, unless he is disabled through illness or injury or is on a recognized leave of absence.

(2) He has at least 15 qualifying years of service during the 18 calendar years preceding the event qualifying him for a disability benefit.

(3) He has become permanently and totally disabled as a result of accident or sickness which forces him to leave gainful employment and registration in the industry and which occurs before his 65th birthday.

(4) He was credited with a qualifying year of service either for the payroll year prior to the payroll year in which his disablement occurred or for the payroll year in which his disablement occurred.

(b) An Employee shall be deemed to be permanently and totally [2] disabled only if, on medical evidence that

is satisfactory to the Trustees of the ILWU-PMA Welfare Fund as amended, he is found permanently and totally unable as a result of accident or illness to engage further in normal employment under whichever of said collective-bargaining agreements, or miscellaneous agreements related thereto, has governed the terms and conditions of his prior employment and, provided further, that he does not earn more than One Hundred Dollars ($100) a month in any other employment or gainful pursuit whatsoever. The Trustees shall decide in their sole, absolute and unreviewable discretion whether permanent and total disability under the foregoing standards has occurred so as to entitle an Employee to disability benefits hereunder.

(c) An Employee applying for a disability benefit shall be required at any reasonable time to submit to an examination by a licensed medical doctor or medical doctors selected by the Trustees and may be required to submit to similar re-examination periodically as the Trustees may direct, provided that the Trustees shall pay the cost of such examinations that are not furnished without charge to the Employee.

(d) The amount of the monthly benefit to a disabled Employee shall be determined by the Trustees of the ILWU-PMA Welfare Trust and shall be paid until he has received a total amount, increasing on an annual straight-line basis according to qualifying years of service, from a minimum of Two Thousand Six Hundred Forty Dollars ($2,640) with 15 years of qualifying service as of the date of disablement to a maximum of Seven Thousand Nine Hundred Twenty Dollars ($7,920) at 25 years of service; except that if death to the disabled Employee should occur prior to his having received the total amount due him, his designee shall be paid the monthly benefits which would have been due the disabled Employee had he continued to live. The total

amounts of the benefit are subject [3] to the power reserved to the Union and Association by paragraph (c), Section 2, Article V of the Agreement to decrease, defer or eliminate payment of the disability benefit.

(e) The requirements for qualifying years of service over 15 years shall be follows:

16 out of the past 19 calendar years
17 out of the past 20 calendar years
18 out of the past 21 calendar years
19 out of the past 22 calendar years
20 out of the past 23 calendar years
21 out of the past 24 calendar years
22 out of the past 25 calendar years
23 out of the past 26 calendar years
24 out of the past 27 calendar years
25 out of the past 35 calendar years

(f) In no case shall such disability benefits be paid to Employees who have retired and become Vestees under Schedule B of the Agreement.

2. Death Benefits.

(a) A designee appointed by an Employee shall be eligible to receive a death benefit when such Employee meets each of the following requirements:

(1) He is *fully* registered under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, and makes himself regularly available for work, unless he is disabled by illness or injury or is on a recognized leave of absence.

(2) He has at least 5 qualifying years of service during the 8 calendar years preceding death.

(3) He was credited with a qualifying year of service either for the payroll year prior to the year in which his death occurred, the payroll year in which death occurred, or the payroll year in which he contracted the illness or injury [4] proximately causing his death, if such payroll year ends subsequent to January 1, 1961.

(4) He dies on or after July 1, 1961, but before retirement, becoming a Vestee under the Plan, or a recipient of a disability benefit under this Schedule A.

(b) A designee appointed by an Employee shall be eligible to receive a death benefit when such Employee meets each of the following requirements:

(1) He has at least *15* qualifying years of service and retires on or after July 1, 1961, under the ILWU-PMA Pension Plan in accordance with the provisions thereof which are in effect on or before January 1, 1962.

(2) He dies on or after July 1, 1961, but before July 1, 1966 and before becoming a Vestee under the Plan or a recipient of a disability benefit under this Schedule A.

(c) The monthly benefit shall become payable on proof of death satisfactory to the Trustees and shall be paid to the designee in monthly installments [1] the amount of each to be determined by the Trustees and shall be paid until he has received a total, which is, increasing on a straight-line basis according to qualifying years of service of the deceased Employee, an amount from a minimum of Two Thousand

[1] Agreement reached to pay death benefit in lump sum, per Trustee meeting of 12/15/61.

Six Hundred Forty Dollars ($2,640) for 5 to and including 15 years of service to a maximum of Five Thousand Dollars ($5,000) for 20 years of service. The total amounts of the benefit are subject to the power reserved to the Union and Association by paragraph (c), Section 2, Article V of the Agreement to decrease, defer or eliminate payment of the death benefit. Requirements for qualifying [5] years of service over 15 in proportion to calendar years shall be as in paragraph (e) of Section 1 hereof.

3. DESIGNEES.

The Trustees shall determine and by regulation define what classes of persons shall be eligible to receive such disability and death benefits as designees, insofar as permitted under 29 USC Section 186. Any payment made by the Trustees to designees in accordance with their determination of eligibility shall be in complete discharge of the liability for any such benefit under this Schedule A or the Plan.

4. QUALIFING YEARS OF SERVICE.

(a) An Employee shall be deemed to have a qualifying year of service in any payroll year if during such payroll year he satisfies any of the following requirements:

(1) During any such payroll year prior to 1945 he was fully registered, or he was a permit man and worked 480 hours.

(2) During any such payroll year after 1944 he qualified for a vacation or worked sufficient hours to qualify for a vacation in his port.

(3) During any such payroll year he served as a Coast Committeeman or as an officer of the Union or a local, or in the joint employ of the parties hereto while fully registered.

(4) During any such payroll year he was continuously absent from employment under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, or any predecessor to any of said collective-bargaining agreements, because of industrial illness or injury arising out of employment under such collective-bargaining agreements so as to be entitled [6] to compensation under a state or federal compensation act, or because of illness or injury proximately causing his death, if such illness or injury was incurred in a payroll year ending subsequent to January 1, 1961. The Trustees may, in their sole, absolute and unreviewable discretion, credit an Employee with a qualifying year of service when the Trustees are satisfied that such Employee was absent from work by reason of such an illness or injury for less than a payroll year but for such an extended period that such Employee could not have acquired a qualifying year of service by making himself available regularly for such employment while not suffering from such illness or injury.

(5) Years of service in the Armed Forces of the United States during World War II or during the Korean Conflict shall be counted as qualifying years of service, and military service at any other time shall be counted as military service for the term of one enlistment or draft, but will not be counted in addition to World War II or Korean Conflict service, and will in no case be counted for more than four years; provided that the Employee was fully registered as required under paragraphs (a)(1) of Sections 1 and 2 hereof immediately prior to his entrance into military service, and returned to the active work force within 120 days after discharge, or

within a longer period if not physically qualified for return to the active work force within 120 days, and if the Employee has since his return to the active work force qualified for a vacation in his port; and provided that no more qualifying years of service be credited to an Employee by reason of this paragraph than would have been credited to [7] such employee if he had been continuously available for work:

(b) The following shall not be deemed qualifying service as an Employee:

(1) Continuous absence from employment for a payroll year or more because of illness or injury, other than specified in paragraph (a)(4) of this Section 4.

(2) Service in the Armed Forces of the United States except as specified in paragraph (a)(5) of this Section 4 or employment during World War II by the United States as a civilian in occupations comparable to those covered by the aforesaid collective-bargaining agreements.

(3) Years of service described under paragraph (a) of this Section 4 of Schedule A which are earned after July 1, 1961, by an Employee who is 65 years of age or older.

(c) Qualifying years of service earned under said Pacific Coast Longshore Agreement, or any predecessor thereto, said Master Agreement for Clerks and Related Classifications, or any predecessor thereto, or any of said miscellaneous related agreements, or any predecessors thereto, shall be interchangeable.

Exhibit 1-E

[1] SCHEDULE B

VESTING BENEFITS

1. VOLUNTARY REMOVAL FROM FURTHER EMPLOYMENT.

(a) An Employee shall become a Vestee and be eligible to receive the monthly vesting benefit set forth in paragraph (b) of Section 1 hereof commencing on or after July 1, 1961, upon meeting each of the following requirements:

(1) He is, and was, for the nine calendar years immediately preceding the date on which he elects to become a vestee, fully registered under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, and makes himself regularly available for work unless he is disabled through illness or injury or is on a recognized leave of absence.

(2) He has at least 25 years of qualifying service out of the past 35 calendar years.

(3) He is at least 62 years of age.

(4) He has voluntarily removed himself from the active work force in compliance with the regulations adopted by the Trustees of the ILWU-PMA Vesting Benefit Trust.

(5) He was credited with a qualifying year of service for the payroll year prior to the payroll year in which he elects to remove himself from further employment.

(b) Vestees shall receive the total sum of Seven Thousand Nine Hundred Twenty Dollars ($7,920) in 36 monthly

payments of Two Hundred [2] Twenty Dollars ($220) each, less applicable payroll and withholding taxes, subject to the power of said Trustees to pay said total sum in monthly payments of not less than One Hundred Dollars ($100), as they may in their sole, absolute and unreviewable discretion decide, and subject to the power reserved to the Union and Association by paragraph (c), Section 2, Article V of the Agreement to decrease, defer or eliminate payment of the vesting benefit.

2. MANDATORY REMOVAL FROM FURTHER EMPLOYMENT.

(a) An Employee shall become a Vestee and be eligible to receive the monthly vesting benefit set forth in paragraph (b) of Section 2 hereof commencing on or after July 1, 1961, upon meeting each of the following requirements:

(1) He is fully registered under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, and makes himself regularly available for work unless he is disabled through illness or injury or is on a recognized leave of absence.

(2) He is age 62 and has at least 22 qualifying years of service out of the past 32 calendar years, or he is age 63 and has at least 23 qualifying years of service out of the past 33 calendar years, or he is age 64 and has at least 24 qualifying years of service out of the past 34 calendar years.

(3) He is compelled to remove himself from the active work force by mutual agreement of the Union and the Association or by decision of an arbitrator under and in accordance with Section 4 of Article VI of the Agreement that such separation from

the active work force is deemed necessary for implementing the Plan.

[3] (b) Employees becoming Vestees under this Section 2 shall receive the total sum of Seven Thousand Nine Hundred Twenty Dollars ($7,920) in 36 monthly payments of Two Hundred Twenty Dollars ($220) each, less applicable payroll and withholding taxes, subject to the power of said Trustees to pay said total sum in monthly payments of not less than One Hundred Dollars ($100), as they may in their sole, absolute and unreviewable discretion decide, and subject to the power reserved to the Union and Association by paragraph (c), Section 2, Article V of the Agreement to decrease, defer or eliminate payment of the vesting benefit. In addition, any such Vestee shall receive an extra payment of One Hundred Dollars ($100) per month, less applicable payroll and withholding taxes, until he reaches age 65, *i.e.*, from the date he is compelled to leave the active work force until his 65th birthday, except that a designee of such a Vestee shall not be entitled to receive said extra payment. Said extra payment shall be made when the need therefor arises by and from the ILWU-PMA Pension Fund as an incident of the ILWU-PMA Pension Plan.

3. DESIGNEES.

Said Trustees shall determine and by regulation define what classes of persons shall be eligible to receive vesting benefits as designees, insofar as permitted under 29 USC Section 186. Any payment made by the Trustees to designees in accordance with their determination of eligibility shall be in complete discharge of their liability for any such benefit under this Schedule B or the Plan.

Exhibit 1-E

4. Death Provision.

In the event a Vestee dies before the total sum of Seven Thousand Nine Hundred Twenty Dollars ($7,920) has been paid to him, his designee shall receive the monthly benefits which would have been due the Vestee [4] had he continued to live, excluding therefrom the additional payments provided for under paragraph (b) of Section 2 hereof.

5. Accelerated Payment.

All benefits to Vestees, or their designees, under the Vesting Benefit Trust shall be by monthly payments, except that upon application of the Vestee, or his designee, his showing cause, and the availability of moneys in the Mechanization Fund, the Trustees may, in their sole, absolute and unreviewable discretion, accelerate payment of the balance of the vesting benefit to which a Vestee, or his designee, may be entitled.

6. Qualifying Years of Service.

(a) An Employee shall be deemed to have a qualifying year of service in any payroll year if during such payroll year he satisfies any of the following requirements:

(1) During any such payroll year prior to 1945 he was fully registered, or he was a permit man and worked 480 hours.

(2) During any such payroll year after 1944 he qualified for a vacation or worked sufficient hours to qualify for a vacation in his port.

(3) During any such payroll year he served as a Coast Committeeman or as an officer of the Union or a local, or in the joint employ of the parties hereto while fully registered.

Exhibit 1-E

(4) During any such payroll year he was continuously absent from employment under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, or any predecessor to any of said collective-bargaining agreements, because of industrial illness or injury arising out of employment under such collective-bargaining agreements so as to be entitled to [5] compensation under a state or federal compensation act. The Trustees may, in their sole, absolute and unreviewable discretion, credit an Employee with a qualifying year of service when the Trustees are satisfied that such Employee was absent from work by reason of such an illness or injury for less than a payroll year but for such an extended period that such Employee could not have acquired a qualifying year of service by making himself available regularly for such employment while not suffering from such illness or injury.

(5) Years of service in the Armed Forces of the United States during World War II or during the Korean Conflict shall be counted as qualifying years of service, and military service at any other time shall be counted as military service for the term of one enlistment or draft, but will not be counted in addition to World War II or Korean Conflict service, and will in no case be counted for more than four years; provided that the Employee was fully registered as required under paragraphs (a) (1) of Sections 1 and 2 hereof immediately prior to his entrance into military service, and return to the active work force within 120 days after discharge, or within a longer period if not physically qualified for return to the active work force within 120 days, and

if the Employee has since his return to the active work force qualified for a vacation in his port; and provided that no more qualifying years of service be credited to an Employee by reason of this paragraph than would have been credited to such Employee if he had been continuously available for work.

(b) The following shall not be deemed qualifying service as an Employee:

[6] (1) Continuous absence from employment for a payroll year or more because of illness or injury, other than specified in paragraph (a) (4) of this Section 6.

(2) Service in the Armed Forces of the United States except as specified in paragraph (a) (5) of this Section 6 or employment during World War II by the United States as a civilian in occupations comparable to those covered by the aforesaid collective-bargaining agreements.

(3) Years of service described under paragraph (a) of this Section 6 of Schedule B which are earned after July 1, 1961, by an Employee who is 65 years of age or older.

(c) Qualifying years of service earned under said Pacific Coast Longshore Agreement, or any predecessor thereto, said Master Agreement for Clerks and Related Classifications, or any predecessor thereto, or any of said miscellaneous related agreements, or any predecessors thereto, shall be interchangeable.

7. DISQUALIFICATION.

An Employee who has qualified for a disability benefit under the Plan and has received payment of any portion

thereof or who has received a pension payment under the ILWU-PMA Pension Plan and has subsequently returned to work as an Employee shall in no event qualify hereunder as a Vestee or be entitled to payment of a vesting benefit in accordance with the provisions of the Plan. An Employee who becomes a Vestee and is as such entitled to receive payment of a vesting benefit under the Plan shall in no event be allowed to return to the active work force unless the parties hereto mutually agree in writing to such return and then only on such conditions as said parties may prescribe.

Exhibit 1-F

[1] SCHEDULE C

SUPPLEMENTAL WAGE BENEFITS

1. EXPLANATORY STATEMENT.

(a) *General Purpose and Nature of Benefit.*

(1) Supplemental wage benefits are designed to afford compensation to eligible Employees whose earnings have been reduced below minimum levels, as herein defined, because of reduced work opportunities suffered by such Employees (despite the fact they have made themselves regularly available for employment), resulting from labor-saving devices and changed work practices adopted by Employers under the permissive provisions referred to in Section 1 (a) of Article VI of the Agreement as incorporated in said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, or several of any of said collective-bargain-

ing agreements, all of which were ratified as of January 10, 1961.

(2) Such supplemental wage benefits are not to compensate Employees on account of reduced [2] work opportunities caused by any economic decline in the Pacific Coast shipping industry and a resultant reduction in the amount of cargo tonnage handled during any period.

(3) Whether or not any such reduction in work opportunities has been caused by such an economic decline or instead has resulted from labor-saving devices or changed work practices adopted by Employers under such premissive provisions shall be determined by the Trustees of the ILWU-PMA Supplemental Wage Benefit Trust in accordance with the formula set forth in Appendix II of this Schedule C.

(b) *Evaluation by Port Areas.* For the purpose of determination by the Trustees of when or whether such Employees have suffered reduced earnings below such minimum levels because of reduced work opportunities resulting from the adoption by Employers of such labor-saving devices and work practices and not from such an economic decline, relevant factors, as herein designated, shall be evaluated by said Trustees on a Port Area basis. A Port Area shall embrace the port, ports or docks in a given area in the States of California, Oregon and Washington when by custom and practice Employees who [3] work out of one port are also customarily offered work at other ports or docks. A single port may comprise a Port Area only if Employees who work out of that port are not customarily offered work in another port. Two ports may comprise a Port Area only if Employees who work out of one of such ports are also customarily offered work in the other port

and such Employees are seldom offered work at a third port.

(c) *Longshore and Marine Clerk Groups.* For the same purpose described in paragraph (b) of this Section 1, Employees shall be assigned by Port Area to one of two Groups: one Group shall be longshoremen whose terms and conditions of employment are governed by said Pacific Coast Longshore Agreement or said miscellaneous related agreements; the other Group shall be marine clerks and Employees in related classifications whose terms and conditions of employment are governed by said Master Agreement for Clerks and Related Classifications.

(d) *Benefit Periods.* A Benefit Period shall be comprised of four consecutive payroll weeks, and said Trustees shall establish a consecutive series of Benefit Periods, without overlapping of, or interval between, Benefit Periods, commencing with the payroll week which includes January 15, 1961.

(e) *Measure of Benefit.* Averages of total hours worked by Employees in each Group in each Port Area [4] shall be determined by said Trustees for each Benefit Period, herein called Group Averages, in accordance with the formula set forth in Appendix I of Schedule C. Pursuant to said formula, and the provisions of Section 4 hereof said Trustees shall also determine for each such Benefit Period whether the relationship between the earnings of any Employee during such Benefit Period and the average earnings of the Group to which such Employee belongs entitled such Employee, if otherwise eligible, to receive a supplemental wage benefit for such Benefit Period.

(f) *Eligibility for Benefit.* Eligibility requirements that must be met by an Employee before he is entitled to receive a supplemental wage benefit are set forth in Section 3 hereof.

(g) *Paramount Provisions.* All of the provisions of this Section 1 are of an explanatory nature, and although the same shall be given effect and meaning as an integral part of this Schedule C, if any term or provision in this Section 1 is inconsistent with any term or provision set forth in subsequent sections of this Schedule C or of Appendices I or II hereof or any provision of the ILWU-PMA Supplemental Wage Benefit Trust the provisions of such subsequent sections or Trust shall be deemed paramount and controlling as to the meaning and effect of any such term or provision [5] in this Section 1; provided that, although the Trustees of the ILWU-PMA Supplemental Wage Benefit Trust shall not have power to change the formulas of paragraph (a) (5) of Section 3 or of Appendices I and II hereof, said Trustees may, in exercise of their discretion, change the amount or numbers of established norms of hours, weeks, or percentage of Group Average, or percentage of total Employees set forth in said formulas, or the amount of $4,800.00 or benefit amount product referred to in paragraph (a)(6) of Section 3 hereof when it appears to said Trustees that said norms operate to preclude realization of the purpose of the Supplemental Wage Benefit Trust.

2. Payment of Benefit for Qualifying Periods.

(a) Supplemental wage benefits shall be payable as to a Group in a Port Area for a Benefit Period when the Group Average of such a Group is less than 140 hours for such Benefit Period.

(b) Said supplemental wage benefits for said Benefit Period shall be paid in a lump sum, in an amount determined pursuant to the provisions of Section 4 hereof, to each Employee, who, during said Benefit Period, is or was a member of such Group and is eligible under the provisions of Section 3 hereof, by said Trustees as soon as they may reason-

ably determine that [6] such a supplemental wage benefit is payable.

3. ELIGIBILITY FOR BENEFIT.

(a) An Employee shall be eligible for a supplemental wage benefit in an amount determined pursuant to the provisions of Section 4 hereof when he has established in compliance with regulations adopted by said Trustees that he meets each of the following requirements:

(1) He has been fully registered within the meaning and under the provisions of said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications or said miscellaneous related agreements at least three years and during a Benefit Period for which said supplemental wage benefit is payable pursuant to paragraph (a) of Section 2 hereof and remains so when said supplemental wage benefit is to be paid pursuant to paragraph (b) of said Section.

(2) He has sufficient hours to qualify for a two week vacation payable in the payroll year which includes the Benefit Period for which said supplemental wage benefit is payable pursuant to the provisions of paragraph (a) of Section 2 hereof.

[7] (3) During the Benefit Period for which said supplemental wage benefit is payable and until the same has been paid pursuant to the provisions of paragraph (b) of Section 2 hereof, he has been available and has not refused dispatch for his work and has not participated, and is not participating, in any work stoppage in violation of said applicable collective-bargaining agreements.

(4) He is not during the Benefit Period for which a supplemental wage benefit is payable pur-

suant to the provisions of paragraph (a) of Section 2 hereof an Excluded Employee as that term is described in Appendix I hereof.

(5) His total hours worked or credited to him during a Benefit Period for which a supplemental wage benefit is payable pursuant to the provisions of paragraph (a) of Section 2 hereof are at least 93% of the Group Average of his Group for said Benefit Period.

(6) His total earnings for the 12 consecutive Benefit Periods immediately preceding the Benefit Period for which a supplemental wage benefit is payable under paragraph (a) of Section 2 hereof, which earnings have [8] been multiplied by the decline adjustment factor determined pursuant to the provisions of Appendix II hereof when said factor for his Port Area for said Benefit Period exceeds 100%, do not exceed the larger of either $4,800.00 or 12 times the benefit amount if the same is determined pursuant to the provisions of Paragraph (b) of Section 4 hereof.

(b) "Total earnings" of an Employee shall include any benefits previously paid under the Plan and all compensation paid to or for the account of such Employee under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or said miscellaneous related agreements, or any of said collective-bargaining agreements, including therein all straight-time, overtime and penalty wages; vacation pay; workmen's compensation payable under any private or public insurance coverage for which an Employer pays all or a portion of the premiums, to the extent such work-

men's compensation is a payment in lieu of earnings lost by reason of absence from work. "Total earnings" shall not include any compensation paid to an Employee for travel time or expenses incurred in connection with travel, or any distribution from the ILWU-PMA Welfare Fund to or for the account or benefit of an Employee.

[9] (c) "Total hours worked" by an Employee shall be determined in accordance with the provisions of Section 3 of Appendix 1 hereof.

(d) Notwithstanding any provision of this Schedule C, an Employee who has received or is receiving payment of a vesting benefit or a death or disability benefit provided by the Plan, or of a pension under the ILWU-PMA Pension Plan shall not be eligible to receive a supplemental wage benefit payable for any Benefit Period.

4. AMOUNT OF BENEFIT.

(a) Subject to the provision of paragraphs (b) to (d), inclusive, of this Section 4, the maximum amount of a supplemental wage benefit shall be $400 for each Benefit Period in which a supplemental wage benefit is payable pursuant to the provisions of paragraph (a) of Section 2 hereof.

(b) Said Trustees may increase the maximum amount of the supplemental wage benefit which is payable to Employees in a Group for a Benefit Period to an amount equal to 140 times the basic straight-time hourly rate payable to Employees under said Pacific Coast Longshore Agreement.

(c) The amount of the supplemental wage benefit, determined pursuant to the provisions of either paragraph (a) or (b) of this Section 4, and payable for a [10] Benefit Period under the provisions of paragraph (a) of Section 2

hereof to an eligible Employee, shall be reduced by the total of the following items:

(1) His total earnings determined pursuant to the provisions of paragraph (b) of Section 3 hereof plus any other earnings from other employment for said Benefit Period, but excluding therefrom any payments during the Benefit Period of workmen's compensation, and vacation pay unless an authorized vacation was in fact taken during the Benefit Period in which case that portion of vacation pay attributable to the time the man was on vacation during the Benefit Period shall be included within said total earnings.

(2) Unemployment insurance compensation, if any, received by such Employee for said Benefit Period.

(d) Notwithstanding any provision of this Schedule C, the maximum amount of a supplemental wage benefit payable to an Employee eligible therefor shall not exceed the difference between 140 hours and the Group Average of his Group in the Benefit Period for which said supplemental wage benefit is payable, multiplied by $2.857 or, if said Trustees have increased the [11] amount of the supplemental wage benefit pursuant to the provisions of paragraph (b) of this Section 4, by the basic straight-time hourly rate so adopted by said Trustees.

5. Disclaimer: Neither the Association, any Employer, any Principal nor the Union guarantees that the portion of the Mechanization Fund allocable or allocated to the ILWU-PMA Supplemental Wage Benefit Trust shall be sufficient to pay the benefits provided by this Schedule C, and none of them shall be required by any provision of the Plan to provide otherwise for payment of such supplemental wage benefits or any portion thereof.

Exhibit 1-F

[1] APPENDIX I TO SCHEDULE C

1. For each Benefit Period a Group Average for each Group in each Port Area shall be computed by finding the average of the total hours worked during a Benefit Period by a representative class of Employees in such Group.

(a) Such representative class of Employees in such Group shall be comprised of those Employees included herein by reason of the provisions of subparagraphs (1), (2), (3) and (4) below.

(1) Each of those Employees in such Group whose total hours worked or credited to him is at least 360 hours within a period of 12 consecutive payroll weeks, the last of such 12 consecutive payroll weeks to be the last payroll week of the Benefit Period, shall be included in said representative class. If the Employees included under this subparagraph (1) equal 70% or more of the total Employees in the Group, then such included Employees shall constitute the entire representative class and the provisions of subparagraphs (2) and (3) do not apply.

[2] (2) Each of those Employees not included by reason of subparagraph (a) (1) of this Section 1 but whose total hours worked or credited to him is at least 30 hours in each of 8 payroll weeks within a period of 12 consecutive payroll weeks, the last of such 12 consecutive payroll weeks to be the last payroll week of the Benefit Period, if at least 2 of said 8 payroll weeks are within the Benefit Period, shall be included in said representative class.

(3) If the total of Employees included by reason of subparagraphs (1) and (2) do not equal at least 70% of the Total Employees of the Group, then the following Employees shall be included.

Exhibit 1-F

(i) The total number of Employees in the Group for such Benefit Period shall now be multiplied by 70% and the product thereof shall be reduced by the sum of the number of Employees to be included under subparagraph (1) plus the number included under subparagraph (2) above. The difference, if any, shall be the number of Employees to be included [3] under this subparagraph (3). Employees to be included under this subparagraph (3) shall be chosen according to individual totals of hours worked and credited to them during the Benefit Period, starting from the highest to the lowest and shall be those who are not to be included within said representative class by reasons of subparagraphs (1) and (2) above.

(ii) All Employees within a Group who have the same total hours worked plus hours credited to them during the Benefit Period shall be included within the representative class thereof, if the provisions of this subparagraph (3) become operative, notwithstanding that not all such Employees are required to insure that said representative class is comprised of at least 70% of the Employees within the Group for such Benefit Period.

(4) An Employee who is on a visitor's permit shall not be included within said representative class of the Group within which he is permitted to make himself available for employment by reason of said visitor's permit.

Exhibit 1-F

[4] (b) Total hours worked, including hours credited, during the Benefit Period by such representative class of a Group which has been developed pursuant to the provisions of paragraph (a) of this Section 1 shall be ascertained and divided by the total number of Employees included in such representative class. This quotient shall be the Group Average for the Group during a Benefit Period.

2. An Employee who is within a Group during a Benefit Period but is not also within the representative class thereof established pursuant to the provisions of paragraph (a) of Section 1 hereof shall be, for the purposes of Schedule C, deemed an Excluded Employee for such Benefit Period.

3. (a) "Total hours worked" by an Employee shall include all hours for which he was entitled to compensation either at straight-time, overtime, or penalty rates; all hours which would be credited to him by reason of an on-the-job injury, or a non-industrial illness or injury, under the provisions of the ILWU-PMA Longshore Agreement on Vacations; and, subject to paragraph (b) of this Section 3, all vacation time for which he has already received vacation pay under said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, or any of said miscellaneous related agreements, or any of [5] several of said collective-bargaining agreements, each day of vacation to be counted as 8 hours; provided, however, hours, or portions thereof, for which an Employee has been allowed "travel time" shall not be included within said "total hours worked".

(b) Vacation time shall be included within the total hours worked by an Employee in a Benefit Period, or portion thereof, when such Employee is on an authorized vacation.

Exhibit 1-F

(c) All vacation time included within the total hours worked by an Employee shall be allocated to the Group of which such Employee was a member when he was on an authorized vacation, notwithstanding such Employee was not a member of such Group when such vacation, or portion thereof, was earned.

[1] APPENDIX II TO SCHEDULE C

1. Whenever for a Benefit Period a Port Area's decline adjustment factor determined pursuant to the provisions of this Appendix II exceeds 100%, an adjustment shall be made, as directed by paragraph (a)(6) of Section 3 of Schedule C, to an Employee's total earnings for 12 consecutive Benefit Periods immediately preceding the Benefit Period for which a supplemental wage benefit is payable pursuant to the provisions of paragraph (a) of Section 2 of Schedule C. No such adjustment shall be made when said decline adjustment factor is 100% or less.

2. Whenever a supplemental wage benefit is payable for a Benefit Period pursuant to the provisions of paragraph (a) of Section 2 of Schedule C, a decline adjustment factor shall be determined for each Port Area for each Benefit Period commencing with the Benefit Period in which January 1, 1962 falls, as follows:

(a) The average annual tonnage handled in such Port Area during the base period shall be computed.

(b) The tonnage handled in such Port Area in a period comprised of 12 calendar months, the last of which ends in such Benefit Period, shall be computed.

[2] (c) The decline adjustment factor for such Port Area in such Benefit Period shall be the percentage resulting from the division of the tonnage figure developed pursuant

Exhibit 1-F

to the provisions of paragraph (a) of this Section 2 by the tonnage figure developed pursuant to the provisions of paragraph (b) of this Section 2.

3. The base period referred to in Section 2 hereof shall be January 1, 1959, to and including December 31, 1960, or such other period which is determined pursuant to the provisions of this Section 3. The Trustees may adopt an alternative base period which they, in their sole judgment, decide more accurately reflects the normal operating conditions of a Port Area prior to implementation of the provisions of the Agreement pertaining to the increasing of efficiency in operations by utilization of labor-saving devices and the elimination of restrictive work practices. In the event of a deadlock among said Trustees, the same shall be resolved under and in accordance with the procedures established by the provisions of Section 4 of Article VI of the Agreement, excluding therefrom the Coast Labor Relations Committee or Coast Arbitrator established or appointed under the Master Agreement for Clerks and Related Classifications solely. The decision of said Trustees, the Coast Labor Relations Committee, or Coast Arbitrator, as the case may be, [3] shall be conclusive and binding on all persons howsoever interested in the Plan.

4. For the purposes of Section 2 hereof, "tonnage" shall be ascertained by giving a weight of one (1) to each ton or equivalent measurement ton, of general cargo, lumber and logs; and a weight of two-tenths (.2) to each ton, or equivalent measurement ton, of bulk dry cargo such as grain, ore and copra. The Trustees shall have power to decide whether in the light of the usual classifications adopted by the Pacific Coast shipping industry a commodity is "bulk dry cargo". The Association and Union, from time to time, during the term of the Agreement may by their mutual agreement change the method provided by this Section 4 for ascertaining "tonnage".

Exhibit 1-G

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone Douglas 2-7973
San Francisco 11, Cal.

November 15, 1961

International Longshoremen's &
Warehousemen's Union
150 Golden Gate Avenue
San Francisco, California

Gentlemen:

As of the above date, the Union and Association executed the ILWU-PMA Supplemental Agreement on Mechanization and Modernization, which formalizes and supersedes the Memorandum of Agreement on Mechanization and Modernization of October 18, 1960.

By paragraph (a) of Section 1 of Article VI of the ILWU-PMA Supplemental Agreement on Mechanization and Modernization, the parties thereto acknowledge that the provisions of said Memorandum of Agreement which are not identified as having been incorporated in said ILWU-PMA Supplemental Agreement on Mechanization and Modernization have been incorporated in the Pacific Coast Longshore Agreement, the Master Agreement for Clerks and Related Classifications, and certain miscellaneous related agreements, all of which collective-bargaining agreements were ratified by both parties thereto as of January 10, 1961. However, the process of integrating the provision of said Memorandum of Agreement which are to be incorporated into said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, and said miscellaneous related agreements has not been completed as of the date hereof. While expeditious completion of said process is anticipated by the parties hereto, they do not wish to delay the execution of

said Supplemental Agreement on Mechanization and Modernization and implementation of the Plan until such time.

By reason of the premises, the Union and Association agree that, notwithstanding their execution of said Supplemental Agreement on Mechanization and Modernization and despite said provisions of paragraph (a) of Section 1 of Article VI, said provisions of said Memorandum of Agreement, which are to be incorporated into said Pacific Coast Longshore Agreement, said Master Agreement for Clerks and Related Classifications, and said miscellaneous related agreements, shall not be superseded but shall continue in full force and effect pending execution of said collective-bargaining agreements by the Union and Association.

[2] All other provisions of said Memorandum of Agreement are, however, in accordance with said provisions of paragraph (a) of Section 1 of Article VI, superseded by said Supplemental Agreement on Mechanization and Modernization, and, when said other collective-bargaining agreements have been completed and executed by the Union and Association, the provisions of said Memorandum of Agreement to be incorporated in said other collective-bargaining agreements shall be superseded as provided by said paragraph (a) of Section 1 of Article VI of said Supplemental Agreement on Mechanization and Modernization.

The signatures below of our respective duly authorized officers confirm our mutual agreement hereinabove set forth.

Very truly yours,

PACIFIC MARITIME ASSOCIATION
By s/ J. PAUL ST. SURE

Approved and Confirmed:
INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
By s/ HARRY BRIDGES

Exhibit 1-H

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone Douglas 2-7973
San Francisco 11, Cal.

November 15, 1961

International Longshoremen's &
Warehousemen's Union
150 Golden Gate Avenue
San Francisco, California

Gentlemen:

As of the above date, the Union and Association executed the ILWU-PMA Supplemental Agreement on Mechanization and Modernization, and, pursuant to the provisions thereof, established the ILWU-PMA Vesting Benefit Trust and ILWU-PMA Supplemental Wage Benefit Trust. In accordance with said Agreement, the Association shall transfer to the various trusts to be employed for effectuation of the Plan substantial sums heretofore collected by the Association from Employers subject to said Agreement.

In transferring said sums to the respective trusts provided for by said Agreement, the Association is relying on certain rulings of the Internal Revenue Service, which are referred to in Section 6 of Article VI of said Agreement; the Association will submit the formal documents establishing the Plan to the Ruling Division of the Internal Revenue Service to obtain confirmation that such documents conform with the outline of the Plan set forth in the rulings heretofore obtained and that the rulings, therefore, remain in full force and effect. Further, the Association intends to request, and anticipates obtaining, a ruling under the Fair Labor Standards Act, as amended, in the form and for the

purpose set forth in Section 9 of Article VI of said Agreement.

By reason of the premises, the Union agrees to adopt promptly with respect to any of the instruments required for implementation of the Plan whatever provisions, if any, are necessary to assure deductibility by the Employers of their Contributions to the Plan and to obtain said ruling under the Fair Labor Standards Act, as amended.

[2] The signatures below of our respective duly authorized officers confirm our mutual agreement hereinabove set forth.

Very truly yours,

PACIFIC MARITIME ASSOCIATION
By s/ J. PAUL ST. SURE

Approved and Confirmed:
INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
By s/ HARRY BRIDGES

Exhibit 1-I

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone Douglas 2-7973
San Francisco 11, Cal.

November 15, 1961

International Longshoremen's &
Warehousemen's Union
150 Golden Gate Avenue
San Francisco, California

Gentlemen:

Pursuant to the provisions of paragraph (b), Section 2, Article II of the ILWU-PMA Supplemental Agreement on Mechanization and Modernization executed as of the above date, the parties hereto agree that Contributions to the Mechanization Fund shall be additions to the total amount of the Mechanization Fund to be accumulated by Member Companies under this Agreement, to the extent set forth herein if and when the same are made pursuant to arrangements negotiated by the Union and acceptable to the Association by the following companies:

1. OLIVER J. OLSON & Co., and/or the SS GEORGE OLSON and owners, the SS MARY OLSON and owners, et al (excluding Contributions attributable to cargoes carried between the continental United States and the Hawaiian Islands by any of them but not excluding a determination respecting any future expanded offshore trade of them in accordance with the provisions of this letter and said paragraph (b), Section 2, Article II.)

2. SAUSE BROS. OCEAN TOWING COMPANY, INC.

3. GRIFFITH STEAMSHIP COMPANY

Exhibit 1-I

4. Pacific Inland Navigation Co. or Inland Towing Company

5. National Metals & Steel Corporation

6. Al Peirce Company

7. Owens-Parks Lumber Co.

8. Dahl Transportation

9. Puget Sound Alaska Van Lines

10. Koppel Brothers

[2]11. Archer-Daniels-Midland Co.*

12. Cargill, Incorporated *

13. Continental Grain Company *

14. Louis Dreyfus Corporation *

15. Interior Warehouse Company *

16. Any company engaged in barge operations on inland waters of the Puget Sound, Columbia-Willamette Rivers, San Francisco Bay, or Los Angeles-Long Beach Harbor, and limited to Contributions attributable to service with respect to intra-state cargoes which they may be handling.

17. Any company which comes into existence after the date of execution of the Agreement and is not a Member Company and which is engaged in transporting or handling, in stevedoring or terminal operations, entirely new business, such as the movement of cargo in a revived "Chinatrade".

If any company specifically identified above or within the classes described by items 16 and 17 becomes a Member Company of the Association, all Contributions made

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* A Pacific N. W. Grain Elevator Operator.

thereafter by such company, as long as it remains a Member Company of the Association, shall not be an addition to the total amount of the Mechanization Fund to be accumulated by Member Companies of the Association.

If a Contribution, or portion thereof, by a company specifically identified above or within the classes described by items 16 and 17 is attributable to its growth hereafter by acquisition of business formerly conducted by a Member Company of the Association, then such Contribution, or portion thereof, shall not be an addition to, but shall reduce the total amount of the Mechanization Fund to be accumulated by Member Companies of the Association, while such company is not a Member Company.

Notwithstanding any provision hereof or of said paragraph (b), a Contribution, or portion thereof, by an Employer, or on the account of a Principal, which was a Member Company of the Association as of January 1, 1961, shall not, in any event, reduce or be an addition to the total amount of the Mechanization Fund to be accumulated by Member Companies of the Association under the Agreement but shall comprise a portion of said total amount.

[3] The signatures below of our respective duly authorized officers confirm our mutual agreement hereinabove set forth, which agreement is hereby acknowledged as being an integral part of the ILWU-PMA Supplemental Agreement on Mechanization and Modernization.

Very truly yours,

PACIFIC MARITIME ASSOCIATION
By s/ J. PAUL ST. SURE

Approved and Confirmed:
INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
By s/ H. J. BODINE

Exhibit 1-J

[1] (First Amendment to ILWU-PMA Supplemental Agreement on Mechanization and Modernization)

This First Amendment to ILWU-PMA Supplemental Agreement on Mechanization and Modernization, entered into as of the 1st day of January, 1961 by and between International Longshoremen's and Warehousemen's Union (hereinafter referred to as "Union"), representing Employees under the Plan, on behalf of itself and all longshore and marine clerks' Locals in California, Oregon and Washington, and Pacific Maritime Association (hereinafter referred to as "Association"), representing its Member Companies under the Plan,

Witnesseth:

Whereas, the parties hereto executed on the 15th day of November, 1961 the ILWU-PMA Supplemental Agreement on Mechanization and Modernization (hereinafter referred to as "Agreement") and caused various trusts to be created, thereby establishing as of the 1st day of January, 1961 the Plan; and

Whereas, pursuant to the provisions of Section 3 of Article VI of the Agreement, the Union requested a review of the basic purposes of the Plan and proposed modifications thereto; and

Whereas, the parties hereto have agreed to certain modifications of said Agreement, to be effective as of January 1, 1962.

Now, Therefore, in consideration of the premises, the parties hereto agree as follows:

Exhibit 1-J

[2] The following paragraph shall be, and hereby is, added as paragraph (c) of Section 1 of Schedule B, attached to said Agreement:

> "(c) An Employee who could otherwise qualify as a Vestee entitled to a vesting benefit hereunder upon complying with the requirements of subparagraph (4) of paragraph (a) of Section 1 hereof but who does not then elect to remove himself from the active work force shall not be precluded at a later date from becoming a Vestee hereunder because he does not work a sufficient number of hours so as to comply with the requirements of subparagraphs (2) and (5) of said paragraph (a) between the date on which he could first become a Vestee and the date of his election to remove himself from the active work force, provided that he elects to so remove himself from the active work force on or before his 68th birthday or July 1, 1966, whichever first occurs."

Executed this 29 day of October, 1962.

For the Association:

S/ J. PAUL ST. SURE

For the Union:

S/ HARRY BRIDGES

Exhibit 2-D

(Minutes of Regular Quarterly Meeting

of

Board of Directors

of

Pacific Maritime Association,
December 12, 1962)

[1] Meeting No. 7

Time: December 12, 1962—10:00 A.M.

Place: 16 California Street, Room 202

Present: *Directors*

Messrs. W. B. Adams
David Gregory
Robert M. Richardson
S. F. Alioto
J. R. Page
George B. Schirmer
Fred R. Smith
Peter Howard
D. N. Lillevand
Fulton W. Wright

Alternates

Messrs. Arno Sieck
Hubert Brown
William R. Purnell, Jr.
J. E. Strowger

Capts. John Knox
E. H. Gluck
J. W. Dickover
Dale E. Collins

Exhibit 2-D

Also
Present: Messrs. C. R. Redlich
E. Horsman

Staff: Messrs. St. Sure
Goodenough
Bourke
MacEvoy
Dellwig
Cornell
Holtgrave
Saysette
Lancaster
Snyder
Robertson

A quorum being present the meeting was called to order by the Chairman at 10:05 A.M.

[2] MEMBERSHIP CHANGES:

Weyerhaeuser Steamship Company

By letter dated November 28, 1962, Weyerhaeuser Steamship Company informed the Association that the name of the company had been changed to Weyerhaeuser Line, Division of Weyerhaeuser Company.

Consolidated Marine, Inc.

A letter of application for membership dated October 30, 1962, was received from Consolidated Marine, Inc.

It was moved, seconded and unanimously carried that Consolidated Marine, Inc. be admitted as a member of this Association with a waiver of the initiation fee.

Exhibit 2-D

Olympic-Griffiths Lines, Inc.

Letter of resignation dated September 4, 1962, was received from Olympic-Griffiths Lines, Inc.

The Board of Directors accepted the resignation of Olympic-Griffiths Lines, Inc. with regret.

It was agreed that Mr. David Gregory would remain as a Director of this Association.

PACIFIC FOREIGN TRADE STEAMSHIP ASSOCIATION REPRESENTATION ON COAST EXECUTIVE COMMITTEE: The Chairman read a letter from the above Association dated November 30, 1962, suggesting that the Foreign Line Group be permitted two members on the Coast Executive Committee. The Chairman stated that a revision of the By-Laws is being considered but in the meantime it was agreed that the attendance of two members from the Foreign Line Group would be welcomed in meetings of the Coast Executive Committee.

CHANGE IN ALTERNATE DIRECTOR: By letter dated August 29, 1962, Mr. Worth Fowler has designated Mr. William R. Purnell, Jr., as [3] his alternate in place of Mr. J. F. Byrne.

BANK SIGNATURES — PACIFIC MARITIME ASSOCIATION — SOUTHERN CALIFORNIA: It was recommended that since Mr. C. J. Bourke had been transferred to Portland that Mr. Bruce C. Swafford be authorized as a third signature on Bank acounts in Southern California.

It was moved, seconded and unanimously carried that the above recommendation be approved.

MECHANIZATION FUND CONTRIBUTIONS:

Volkswagens

The Chairman stated that the Board of Directors had previously been informed of this situation in the meeting

of July 3, 1962. He then read a letter from Counsel of Marine Terminals Corporation, as well as a letter from PMA Counsel dated December 10, 1962.

Volkswagen has refused to pay the Mechanization Fund assessment. This Association filed suit against the stevedoring company in the United States District Court to recover the amounts of the assessments and the company in turn, impleaded Volkswagenwerk as the party ultimately liable. Volkswagenwerk answered the suit by contending that the assessments were illegal under the Shipping Act. It asked that the suit be stayed to permit proceedings before the Federal Maritime Commission to determine the legality of the assessments. The District Court granted Volkswagenwork's request for a stay, on condition that proceedings be commenced before the Federal Maritime Commission by December 29. It is impossible to predict how long proceedings before the Commission might take. It was agreed that the Chairman will convene a meeting with PMA Counsel and stevedore Counsel to determine a course of action under the present situation.

[4] *Coastwise Lumber*

The Chairman reviewed the resolutions adopted at Meeting No. 4 July 3, 1962, respecting the contribution rate to the Mechanization Fund with respect to lumber moving in the coastwise trade and subject to penalty rates of $1.00 per hour straight time and $1.50 per hour overtime. It now appears that other lumber moving in the coastwise trade is subject to penalty rates of 28 cents per hour straight time and 42 cents per hour overtime with respect to which the contribution rate to the Mechanization Fund should be modified.

It was moved, seconded and unanimously carried that effective as of January 16, 1961, the contribution rate on all lumber moving in the coastwise trade between ports in Washington, Oregon and California shall be $.05 per ton,

2½ cents of which is paid at the port of loading and 2½ cents at the port of discharging.* 1000 board feet of lumber shall constitute a ton. The coastwise trade shall be deemed, and be limited to, such trades to which the penalty rates of either $1.00 per hour straight time and $1.50 per hour overtime, or 28 cents per hour straight time and 42 cents per hour overtime, as set forth in the basic Longshore Agreement, pertain.

STEWARDS' LITIGATION: The Chairman stated that the question as to reimbursement of Counsel of individual member companies had been discussed in the previous meeting of July 3, 1962. The Chairman [5] stated as of yet there has been no solution to this problem.

After considerable discussion it was agreed that a Committee composed of Captain Dickover, and Messrs. W. Adams and P. Teige would make a recomendation to the Board of Directors on this matter.

SEAGOING PERSONNEL ASSESSMENT: The Chairman submitted a Schedule of Average Monthly Seagoing Personnel for the period September 30 through December 31, 1962, which in accordance with the By-Laws is used to determine seagoing personnel dues and voting strength for the fourth quarter of 1962.

It was moved, seconded and carried that the regular seagoing assessment be $2.05 per man per month for the fourth quarter ending December 31, 1962.

STEWARDS TRAINING & RECREATION, INC.: The Chairman stated that the Association had been contributing $5,000 per month to the support of Stewards Training & Recreation,

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* When the commodity moves between Canada, Alaska, and the three Western States, the $.05 per ton rate shall apply to either the loading or discharging, whichever is performed under the terms of the basic Longshore Agreement.

Inc. The MC&S Union has been advised that these contributions have ceased.

It was recommended that the 6¢ per man per day contribution for this purpose be discontinued as of November 30, 1962. The Board of Directors agreed to the discontinuance and further agreed that the disposition of the surplus in this Fund will be discussed at a later date.

STAFF SALARIES: The Coast Executive Committee has reviewed and approved a recommendation relative to the annual salary review. The proposal is that a sum not to exceed 5 per cent be approved, ½ to be applied on an "across the board" basis, and the remainder, so far as necessary, be applied to adjust individual inequities over the next 12 month period. The 2½ per cent "across the board" increase would become effective January 1, 1963.

[6] It was also proposed that general increases be discontinued in the future, and that a formal merit salary administration be substituted.

It was moved, seconded and unaimously carried that the above recommendations be approved.

PMA STAFF PENSIONS: The Chairman reported that in the past the Board of Directors has approved supplementing a staff member's pension to bring the pension to approximately 40 per cent of salary at time of retirement, including Social Security. The Association now is spending approximately $1,600 a month for this supplementation.

It has been recommended and approved by the Coast Executive Committee that the PMA Staff Pension Plan be amended to provide for the purchase of past service annuities to correct present inadequacies and eliminate the prospective "supplemental allowances" now being given to retiring employees out of General Funds. The cost of this change would amount to approximately $92,000 over a 10 year period.

Exhibit 2-D

The Chairman also reported that three individuals are retiring as of January 1, 1963—Fred Bode in San Francisco, F. X. Foeller and Walter Emig in Portland. Using the practice of the Association over the past years, Mr. Bode's retirement allowance would amount to $334.80, including Social Security. The supplemental allowance in this case would be $122.60 per month. Mr. Foeller would require an additional $20.65 per month and Mr. Emig would require an additional $22.83 per month.

After discussion it was moved, seconded and unanimously carried that the Board of Directors endorse in principle the [7] proposal of purchasing past service annuities for the affected employees, and that staff prepare a summary of the Pension Plan with the facts concerning this matter for submission to the Board of Directors for their study and decision, and in addition, Messrs. Bode, Foeller and Emig on retiring January 1, 1963, be given the supplemental allowances referred to above with the understanding that if past service credits are purchased they will then come fully under the Pension Plan.

PACIFIC COAST DAYLIGHT TIME—OREGON: The Oregon Office of PMA has advanced $3,000 on this account. It is now suggested that the collection of this amount be on a ship fee basis of $5.00 per vessel's call. This fee would be payable by companies who hadn't otherwise contributed. The Board of Directors asked staff to advise the Portland Office that they had no objection to this.

Several Directors stated that in their opinion the Association should not get into this type of local activity in the future.

CONTRIBUTION TO INTER-ASSOCIATION UNEMPLOYMENT INSURANCE COMMITTEE: The Board of Directors approved the annual contribution of $1,000 to the Inter-Association Unemployment Insurance Committee.

Exhibit 2-D

MECHANIZATION FUND CONTRIBUTIONS: The Chairman reported that the current contribution formula is meeting the requirement for payments into the Fund.

WALKING BOSS MECHANIZATION FUND CONTRIBUTIONS: The Chairman reported that contributions to the Walking Boss Mechanization Fund have been accumulated on the basis of 4¢ per ton during the year 1962.

It is recommended that effective January 1, 1963 the contribution rate be reduced from 4¢ per ton to 2¢ per ton.

It was moved, seconded and unanimously carried that the contribution rate to the Walking Boss Mechanization Fund be 2¢ [8] per ton effective January 1, 1963.

REPORT ON VARIOUS LABOR RELATIONS MATTERS: The Chairman commented briefly on the following subjects.

Several meetings have been held with the Direct Employers concerning the Conformance Program and liquidated damages. It has been agreed that a Sub-Committee will meet in San Francisco to arrive at procedures and recommendations. The Chairman felt that progress was being made. He also stated that a Direct Employer had been added as a member of each Sub-Steering Committee, including the Coast Steering Committee.

A productivity study will be available in January giving the full year comparison 1960-1961 by quarters and by areas. A Sub-Committee is examining the reporting system for any improvement that can be devised.

It has been agreed in C.L.R.C. to register not more than 1,000 men on the Pacific Coast. Agreement has been reached with the ILWU that this will be done without an additional charge under the Mechanization Fund, and no liability will exist to the Fund under the wage guarantee. This is merely a stopgap to correct a problem and a study committee has been named to come up with a complete formula.

Exhibit 2-D

The Coast Arbitrators and the Area Managers met with the ILWU and PMA staff to discuss problems of interest to the parties. PMA staff and Coast Steering Committee feel that this was a very worthwhile meeting.

The Marine Firemen and Sailors working rule discussions have been completed. There are still some problems remaining with the MC&S.

[9] Secretary of Labor W. Willard Wirtz has handed down his Award on six items referred to him under the MM&P Agreement.

PAYMENT OF ASSESSMENTS TO ASSOCIATION: It was suggested that member steamship companies directly pay to the Association all assessments that can be handled in this manner. It was agreed that staff will check this situation and report back.

PMA BUILDING—SOUTHERN CALIFORNIA: It was reported that the lot has been purchased and the architect is engaged in drawing up plans for final approval, following which bids will be solicited. The lease on present quarters runs until April, 1963.

Meeting adjourned at 12:10 P.M.

(Signed) J. A. Robertson
J. A. ROBERTSON
Secretary

JAR:ah

Exhibit 2-F

(MINUTES OF MEETING OF BOARD OF DIRECTORS AND AMERICAN FLAG OPERATORS OF PACIFIC MARITIME ASSOCIATION, JULY 3, 1962)

[1] Meeting No. 4

Time: 10:00 A.M., July 3, 1962

Place: 16 California Street, Room 202

* * *

[4] MECHANIZATION FUND CONTRIBUTIONS—REPORT OF FUNDING COMMITTEE: The Chairman reported that Mechanization Fund contributions are now being collected on government cargoes.

Coastwise Lumber

The Chairman reported the considerations of the Funding Committee respecting the rate of assessment to be employed for [5] the determination of contributions to the ILWU-PMA Mechanization Fund by Employers rendering cargo-handling services involving Coastwise movements of lumber. It appeared that during the last decade a penalty rate of $1.00 per hour straight time and $1.50 per hour overtime has been charged for the handling of such cargoes, which rate was first established by collective bargaining as a consequence, in part, of improved methods of handling lumber shipped in the coastwise trade. Further, it appeared no other type of cargo is subject to a similar penalty rate. By reason of the premises the Funding Committee recommended a reduction in the rate of contributions to the Mechanization Fund with respect to cargo-handling services rendered cargoes of coastwise lumber.

It was moved, seconded and unanimously carried that effective as of January 16, 1961, the contribution rate on

all lumber moving in the coastwise trade shall be $.05 per ton, 2½¢ of which is paid at the port of loading and 2½¢ at the port of discharging. 1000 board feet of lumber shall constitute a ton. The coastwise trade shall be deemed, and be limited to, such trades to which the penalty rates of $1.00 per hour straight time and $1.50 per hour overtime, as set forth in the basic longshore agreement pertain.

Volkswagens

The Board of Directors were also informed that various companies on the Pacific Coast handling Volkswagens had made no contribution to the Mechanization Fund.

The Coast Steering Committee in meeting on March 27, 1962, agreed that staff should write a letter to Marine Terminals Corporation advising that Company that the Funding Committee had [6] again reconsidered the Mechanization Fund assessment on unboxed automobiles and did not recommend any change in the present assessment. This letter has been sent.

The Coast Steering Committee further recommended that the Board of Directors modify their previous action so as to provide that PMA Counsel assist Marine Terminals Corporation (and other stevedoring companies handling Volkswagens) only if any action by or against Marine Terminals raises issues which jeopardize the Mechanization Plan or other interests of the industry, in which case PMA Counsel be authorized to intervene and, if necessary, assume responsibility for handling that portion of the action involving such issues. If PMA Counsel does not act in such circumstances, the Association reserves the right to institute action against such member companies if the companies themselves are still in default of the Mechanization Fund Assessments.

It was moved, seconded and unanimously carried that the recommendation of the Coast Steering Committee be approved.

* * *

Exhibit 2-H

(MINUTES OF REGULAR MEETING

OF

BOARD OF DIRECTORS

OF

PACIFIC MARITIME ASSOCIATION, DECEMBER 13, 1961)

[1] Meeting No. 11

Time: 10:00 A.M.—December 13, 1961

Place: 16 California Street, Room 202

Present: *Directors*

* * *

[4] WALKING BOSS AGREEMENT: The Chairman reported that after several months of negotiations agreement had been reached with the Walking Bosses in regard to a mechanization fund and requested authorization of the Board to sign said agreement. There being no objection, the agreement was approved.

MECHANIZATION FUND—NON-MEMBER CONTRIBUTION: The Chairman read a communication from the Funding Committee covering the problem of collecting funds from Volkswagen due the Mechanization Fund. After discussion it was decided that the method of contribution originally established for this type of cargo should be maintained. Marine Terminals requested that a letter covering this discussion be forwarded to them and that they be authorized to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel.

Exhibit 2-H

Further in regard to the Mechanization Fund there was discussion about contributions on clerks' hours. Such discussion [5] was based on a memorandum dated December 13, 1961 (copy attached). Mr. Peter Teige, Chairman of the Funding Committee, explained the reasons for the changes in contribution rates covered in said memorandum and it was moved, seconded and carried that the rates referred to in the subject memo become effective as of December 18, 1961.

Further on the Mechanization Fund the Chairman reported that in the November 7, 1961 meeting of the Board the Funding Committee had made five recommendations, 4 of which had been adopted with the fifth one being held over for further discussion. Mr. Teige reported that the Funding Committee had made further study of the held over question; namely, a procedure for penalties where payments are delinquent. After review by the Board of the Funding Committee's revised proposal it was moved, seconded and carried that a policy be inaugurated whereby amounts due the M & I Fund which had not been paid 90 days from the end of the month in which the work was performed will be considered delinquent and such employers shall be charged liquidated damages, including interest on the amount delinquent, at the rate of 1% per month, or any portion of a month, commencing on the date of delinquency. Excluded from these penalties were the delinquencies on Army and Navy contracts and the Volkswagen delinquency pending final disposition of these accounts.

Meeting adjourned at 12 noon.

/s/ B. H. Goodenough
B. H. Goodenough

BHG:rr

Exhibit 2-I

(MINUTES OF MEETING OF BOARD OF DIRECTORS OF PACIFIC MARITIME ASSOCIATION, NOVEMBER 7, 1961)

[1] Meeting No. 10

Time: November 7, 1961—10:30 a. m.

Place: 16 California Street, Room 202

Present: *Directors*

Messrs. Clarence Morse
John Page
Harmon Howard

Alternates

Messrs. Dale E. Collins
Wayne L. Horvitz
Owen F. Niemann
John Knox
Arno Sieck
J. F. Byrne
E. J. Spear
Robert M. Richardson
A. C. Fenger
George T. Littlejohn

Also Present: Hubert Brown

Staff: Messrs. J. Paul St. Sure
B. H. Goodenough
Ralph Holtgrave
K. F. Saysette
Pres Lancaster
J. A. Robertson

A quorum being present the meeting was called to order by the Chairman at 10:40 a.m.

Exhibit 2-I

MEMBERSHIP:

Shaffer Terminals

The resignation of Shaffer Terminals by letter dated October 6, 1961 was accepted.

[2] *Tacoma Stevedore & Terminal Co.*

An application for membership received from Tacoma Stevedore & Terminal Co. under date of October 9, 1961, was approved with a waiver of the initiation fee, because of a transfer of membership from Shaffer Terminals.

Columbia Basin Terminals

The resignation of Columbia Basin Terminals dated September 13, 1961 was accepted.

Stockton Bulk Terminal Co. of California

An application from Stockton Bulk Terminal Co. of California dated February 10, 1961, was approved subject to satisfactory discussions with the ILWU and the Company, because of the existence of a separate contract the Company has with the ILWU.

CENTRAL RECORDS OFFICE EQUIPMENT: By mailing of October 17, 1961, the Board was apprised of a recommendation for the modernization of Central Records office equipment at Portland and Wilmington.

It was moved, seconded and unanimously carried that authority be granted to proceed in line with the recommendation and the schedule.

ILWU-PMA PENSION CONTRIBUTION: The Chairman stated that the Agreement reached with the ILWU on Pensions had been previously reported to the Board of Directors. An increase of 5¢ per manhour as the cost of increased benefits agreed to in the pension reopener and 3¢ increased contribution due to a shrinking manhour base

are necessary. Thus, it is recommended that the contribution to the ILWU-PMA Pension Fund be 23¢ per manhour [3] effective 8:00 a.m., Monday, November 13, 1961.

It was moved, seconded and unanimously carried that the ILWU-PMA Pension Fund contribution be at the rate of 23¢ per manhour effective 8:00 a.m., Monday, November 13, 1961.

APPOINTMENT OF TRUSTEES

ILWU-PMA WELFARE PLAN

Messrs. Hubert Brown and K. F. Saysette are currently serving, and J. A. Robertson was approved as a trustee in place of J. P. Cribbin.

ILWU-PMA PENSION PLAN

Messrs. K. F. Saysette and B. H. Goodenough are presently serving as Employer trustees. The Board of Directors approved the appointment of Hubert Brown and J. A. Robertson (as replacement for B. H. Goodenough) as Employer trustees on the Fund.

ILWU-PMA VESTING BENEFIT TRUST

ILWU-PMA SUPPLEMENTAL WAGE BENEFIT TRUST

The Board of Directors approved Messrs. K. F. Saysette, R. J. Pfeiffer and Captain C. Pryor as Employer trustees of these Funds.

REPORT OF FUNDING COMMITTEE: The Chairman reported that a report has been filed by the Funding Committee under date of July 18, 1961, in accordance with action of the membership on January 10, 1961. This report states that the Committee, as of this time, has no new suggestions to make for changes in the present formula. The Funding Committee will continue to discuss this subject.

• • •

Exhibit 2-I

RECOMMENDATIONS OF FUNDING COMMITTEE: The Funding Committee as of August 1, 1961, made the following recommendations:

[4] (1) A new policy be inaugurated whereby amounts due the M & I Fund which have not been paid after 30 days from the end of the month in which they accrued shall at that time be deemed delinquent and such employers shall be charged liquidating damages, including interest on the amount delinquent at the rate of 1 per cent per month, or any portion of a month, commencing at the date of delinquency.

(2) A report showing the names of delinquent employers and the amount of delinquency be distributed to the membership if the employer has amounts still delinquent 30 days after the date of original delinquency.

(3) Price Waterhouse & Co. conduct a spot-check of tonnage declarations by investigating the declarations of approximately 15 employers a year, subject to holding the total expenditure for the year to $5,000 or less. Price Waterhouse & Co. had indicated they could check an average employer for about $300. The Committee further recommended that it might be well to have the spot-checks for this year made as soon as possible.

(4) For fund assessment purposes, Army conexes (except those shipped on a Government Bill of Lading) be treated the same as commercial *carrier loaded* containers.

(5) In view of the hardship on the part of the Army to determine the actual measurement of the cargo placed in containers, they be permitted to determine the contents based on periodic checks of the

actual *average* measurement and the use of the average percentage of utilization of the total capacity of the containers as the basis for the assessment on this containerized cargo.

It was moved and seconded that recommendations (2) through (5) be approved and that recommendation (1) be the subject of further discussion by the Committee. Unanimous:

MECHANIZATION FUND CONTRIBUTIONS ON VOLKSWAGENS: The Board of Directors was informed that the Volkswagen firm has refused to pay Mechanization Fund contributions on Volkswagens [5] stevedored by Marine Terminals (and in the Northwest by Seattle Stevedoring and Brady Hamilton). The Board of Directors agreed that the stevedoring companies should take such action as they deem best in the protection of their interest and further that this matter should be discussed with Counsel and the Funding Committee.

STAFF SALARIES: The Chairman recommended that staff, excluding the Chairman, be granted a 4 per cent general increase as of November 1, 1961.

It was moved, seconded and unanimously carried that the recommendation for a staff salary increase be approved.

ROGERS ET AL V. ALASKA STEAMSHIP COMPANY, ET AL: The Chairman explained that this litigation had been going on for a number of years. Two sets of cases were involved; one before the State Court which has been dismissed—the other in the Federal District Court. The Supreme Court has denied a writ of certiorari which leaves one possible individual case which should not be serious.

Exhibit 2-I

RETIREMENTS:

J. H. Travers

The Chairman explained that Mr. J. H. Travers, at his request, retired on June 1, 1961, having been employed by the Association since May 15, 1930. His age at date of retirement was approximately 61½ years. The Chairman pointed out to the Board that the Association in the past has subsidized individuals on retirement in an amount sufficient to provide approximately 40 per cent of salary at date of retirement, after taking into consideration benefits received under the Federal Social Security Act.

[6] *Mrs. Rhoda Jennet*

Mrs. Jennet of the Accounting Department desires to retire effective January 1, 1962, due to ill health. Her age at retirement will be 62 years. She has been employed by the Association for 25 years. In order to maintain the 40 per cent formula, a contribution from PMA of $70.00 per month is required.

It was moved, seconded and unanimously carried that the Association pay $50.00 per month to J. H. Travers, effective July 1, 1961, and $70.00 per month to Mrs. Rhoda Jennet, effective January 1, 1962.

MATTER CONTAINED IN INVESTIGATING COMMITTEE'S REPORT OF 8/12/61:

M. S. PHILIPPINE MARU—August 15-16, 1960
Williams, Dimond & Co.
It was moved, seconded and carried:

> That Williams, Dimond & Co. is guilty of violating the 'Rules of Labor Policy' as found by the Investigating Committee in its written report dated August 12, 1961;
>
> That liquidated damages in the sum of $5,000.00 are payable by the company to the corporation for

the account of the members of said corporation, as provided in Article XI, Section 5 of the By-Laws;

That said sum of $5,000.00, as liquidated damages and not as a penalty, be paid within ten days after receipt of written demand therefor from the corporation;

That if said violations continue or are renewed after receipt by said company of notice of this action and demand, that appropriate additional damages shall be payable in accordance with the provisions of Article XI, Section 5 of the By-Laws.

SEAGOING PERSONNEL ASSESSMENTS: The average monthly seagoing personnel for the quarter ending September 30, 1961, for purposes of voting strength, and also for the basis for monthly assessments for the quarter ending December 31, 1961 was distributed.

[7] It was moved, seconded and unanimously carried that the seagoing personnel assessment be $1.50 per man per month for the fourth quarter ending December 31, 1961.

PALLET BOARDS: The Chairman reported that discussion has occurred in the Coast Executive Committee and Coast Steering Committee as to the use of a universal type of board and a study of the methods of cargo handling to take full advantage of the ILWU-PMA Agreement. The Board of Directors expressed interest and agreed that PMA should explore this subject and report back.

Meeting adjourned at 12:15 p. m.

J. A. Robertson,
J. A. ROBERTSON,
Secretary

JAR:ah

Exhibit 2-K

(MINUTES OF MEETING OF BOARD OF DIRECTORS OF PACIFIC MARITIME ASSOCIATION, JULY 11, 1961)

[1] Meeting No. 6

Time: July 11, 1961—2:00 P. M.

Place: 16 California Street, Room 202

* * *

[4] FUNDING—MODERNIZATION & IMPROVEMENT FUND

The Chairman reported that the report of the Funding Committee would be passed until the next meeting of the Board of Directors. The Funding Committee will be asked to investigate the refusal of certain Direct Employers to pay the M & I Fund Assessments. Likewise, the question of employing certified public accountants to check tonnage declarations made by companies to substantiate the tonnage declarations and contributions paid was referred to the Funding Committee for recommendation.

* * *

Exhibit 2-L

(MINUTES OF ANNUAL MEETING OF MEMBERS OF PACIFIC MARITIME ASSOCIATION, MARCH 8, 1961)

[13] Time: March 9, 1961—10:00 A.M.

Place: 16 California Street, Room 202

* * *

[16] REPORT OF COMMITTEE ON FUNDING: The report of this Committee was presented to the President under date of March 3, 1961, containing the following recommendations:

1. That empty Army conexes be placed on the same basis for assessment purposes as empty commercial containers owned by steamship carriers.

2. That Army conexes containing cargo be assessed in the same manner as commercial containers moving in the trade; namely, on a manifested measurement or (weight, as the case may be) basis of the cargo therein contained.

[17] 3. That coastwise cargo be assessed in the traditional manner at the rate of one-half of the Work Improvement Fund rate for offshore and intercoastal cargo; that is, a single ton of coastwise cargo would pay a total of 27½¢ assessment, one-half at the point of loading and the other half at the point of discharge.

4. The Committee recommends no change in the method of assessment of the other cargoes discussed in their report.

It was moved, seconded and carried that the changes as recommended by the Committee on Funding be approved.

Exhibit 2-L

The Chairman stated that W. R. Chamberlin & Co. will be placed in a non-competitive position if non-members of PMA reach a different settlement with the ILWU. The ILWU has been contacted and said they will reach no different agreement with non-members.

* * *

[18] MODERNIZATION AND IMPROVEMENT FUND—METHOD OF CONTRIBUTIONS: The Chairman explained that the Bureau of Internal Revenue has indicated, through counsel, that in order to secure deductibility [19] of contributions on a tonnage basis to the Fund, such contributions will have to be made by the employers of the various employees who will derive benefits from these contributions. This method would vary from the previous action taken by the Board of Directors in this matter when a motion was passed to the effect that contributions would be made in the same manner as those being made to the Association for tonnage dues purposes, which was by the member steamship companies or by the contracting stevedores reporting tonnages for non-member steamship companies.

In order to guarantee deductibility of contributions it is now necessary to modify the reporting and payment procedures in such a way that the contracting stevedore will make the contributions to the Association, not only for tonnage handled for member companies, but also for non-members.

It was moved and seconded that the member contracting stevedores will make contributions to the Association on a tonnage basis to the Modernization and Improvement Fund for member steamship companies, as well as non-member steamship companies. The motion was amended with the consent of the second that the steamship companies will send a check to the contracting stevedore at the same time as the advice notice is sent.

Exhibit 2-L

During discussion of the motion and the amendment the suggestion was made that the check should be drawn jointly to the stevedore and to the Fund. Suggestions were likewise made to the effect that the steamship companies be asked to make funds available to their stevedores for the payments. Following discussion vote on the motion was taken and the motion carried.

[20] The Chairman also referred to the current difficulties being experienced by the Treasurer in collecting the contributions to the Mechanization and Modernization Fund.

Meeting adjourned at 12:15 P. M.

/s/ J. A. Robertson
J. A. Robertson,
Secretary.

JAR:ah

Exhibit 2-N

(MINUTES OF MEETING OF BOARD OF DIRECTORS
PACIFIC MARITIME ASSOCIATION, JANUARY 16, 1961)

[1] Meeting No. 3

Time: January 16, 1961—11:00 A.M.

Place: 16 California Street—Room 202

Present: *Directors*

Messrs. W. B. Adams
J. Wyand
S. F. Alioto
David Lindstedt
George B. Schirmer
Harmon K. Howard
Charles L. Tilley

Alternates

Messrs. Dale E. Collins
W. L. Horvitz
John Knox
David Gregory
E. H. Gluck
Hubert Brown
J. F. Byrne
C. R. Redlich

Also Present: Mr. John Page

Staff: Messrs. J. Paul St. Sure
K. F. Saysette
Pres Lancaster
J. A. Robertson

A quorum being present the meeting was called to order by the Chairman at 11:05 A.M.

Exhibit 2-N

The Chairman stated that by letter to the Board of Directors dated January 12, 1961, it was explained that at a Membership Meeting on January 10, 1961, a question was raised as to the definition of bulk cargoes, and whether scrap iron, pig iron and steel shavings should be considered as bulk. This question was left to the determination of the Board of Directors.

[2] The Chairman stated that by definition for tariff purposes scrap iron and pig iron are bulk commodities. The tariff definition reads in part ". . . which by nature of their unsegregated mass are usually handled by shovels, scoops, buckets, forks, magnets or other mechanical conveyors and which are loaded or unloaded and carried without wrapper or container and received and delivered by carriers without transportation mark or count." A number of telegrams and letters have been received on this matter of the classification of scrap.

It was pointed out that if scrap was classified as a bulk commodity, the general cargo rate for contributions would become 27½ cents rather than 26¾ cents, and the bulk rate would be 5½ cents.

Considerable discussion then ensued, and it was mentioned that if one commodity is changed, there might be others raised for similar consideration. Automobiles had already been the subject of discussion. The suggestion was made that the Sub-Committee for the determination of the method of funding be called back into session immediately to review the entire question, and to issue a report to the Membership 30 days prior to the six month review date.

It was moved and seconded that unpackaged scrap metal, such as scrap iron and pig iron, handled by shovels, scoops, buckets, forks, magnets or mechanical conveyor and not in containers which are loaded or unloaded and carried without wrapper or container and without transportation mark or count is to be classified as a bulk cargo, and that the

rate of contribution to the Fund be 27½ cents on general cargo and 5½ cents on bulk cargo effective as of January 16, 1961.

[3] Vote on the motion: 12—yes
0—no
3—withheld

Motion carried.

It was agreed that the present Sub-Committee on funding, or a new Committee, would begin functioning immediately.

It was agreed that the tonnage declarations made by companies are to be made in exactly the same manner as manifested and reported during the year 1959, and any changed method of manifesting from that date will not be valid for reporting tonnages covering the fund contributions. It was further agreed that the Association assessment as to the inclusion of scrap metal in the bulk classification will be changed in conformity with the motion.

It was agreed that the Association may employ certified public accountants to check tonnage declarations made by companies to substantiate the tonnage declarations and contributions paid.

It was reported to the Board of Directors that the Association will refund to contributing Direct Employers the contributions paid on the basis of 6½ cents per manhour from June 15, 1960 to December 31, 1960, and that the 6½ cents per manhour contribution has been discontinued as of January 2, 1961.

It was agreed that the contributions to the Fund will be effective as of January 16, 1961 on all vessels which have commenced loading or discharging cargoes on and after that date. Any operation which started prior to January 16, 1961 will not be affected by the contribution.

[4] It was pointed out that there will be no changes in operation under the new Agreement until notice is received

Exhibit 2-O

from the Coast Steering Committee. The Coast Steering Committee will attempt to make changes effective January 30, 1961.

Meeting adjourned at 12:20 P.M.

J. A. ROBERTSON
Secretary

JAR:ah

Exhibit 2-O

(MINUTES OF MEETING
OF
MEMBERS
OF
PACIFIC MARITIME ASSOCIATION, JANUARY 10, 1961)

[1] Meeting No. 2

Time: January 10, 1961—10:00 A.M.

Place: 16 California Street—Room 202

Present:	*Company*
Messrs.	
T. W. Buchholz	Metropolitan Stevedore Company
E. F. Ebbey	California Steve. & Ballast Co.
George B. Plant	M & R Services, Inc.
R. C. Clapp	Rothschild-International Steve.
Jens Feragen	Fred Olsen Line Agency, Ltd.
Jens Feragen	Maersk Line (Fred Olsen Line Agency, Ltd., Agents)
Elliott J. Spear	N.Y.K. Line
Elliott J. Spear	International Terminals, L.A.

Exhibit 2-O

Messrs.	*Company*
David Lindstedt	Blue Star Line, Inc.
S. F. Alioto	Interocean Line
S. F. Alioto	Crescent Wharf & Warehouse
S. F. Alioto	Outer Harbor Dock & Wharf, Inc.
Hubert Brown	Pacific Far East Line
Peter N. Teige	American President Lines
J. C. Strittmatter	Consolidated Stevedoring Co.
Gohta Yamada	Mitsui Line
J. E. Slevin	
W. K. Varcoe	Williams, Dimond & Co.
G. Eberhard	Seaboard Stevedoring Corp.
G. Eberhard	Pacific Ports Service Co.
J. F. Byrne	American Mail Line
W. L. Horvitz	Matson Navigation Co.
R. J. Pfeiffer	Matson Navigation Co.
H. B. Copsey	Jones Stevedoring Co.
A. H. Jones	Jones Stevedoring Co.
K. B. Kristensen	East Asiatic Co., Inc.
E. L. Bargones	Transpacific Transportation Co.
E. L. Bargones	Pacific Oriental Terminal Co.
E. L. Bargones	Indies Terminal Co.
A. L. Wise	Kerr Steamship Company
A. L. Wise	Kawasaki Kisen Kaisha, Ltd.
F. R. Noyes	States Marine Lines
J. B. Wyand	Luckenbach SS Co., Inc.
J. C. Gallagher	Associated Banning Co.
H. P. Schnitler	States Steamship Company
H. P. Schnitler	Pacific Atlantic SS Co.
H. P. Schnitler	Portland Stevedoring Co.
J. F. Litz	Interocean Line
Harmon K. Howard	Howard Terminal
G. Jones	Jones Stevedoring Co.
J. W. M. Schorer	Holland-America Line
O. I. M. Porton	Royal Mail Lines, Ltd.

Exhibit 2-O

Messrs.	*Company*
James West	Furness Withy & Co., Ltd.
George Littlejohn	Grace Line
George Littlejohn	Johnson Line
[2] D. Ward	American President Lines
E. H. Gluck	Moore McCormack
W. B. Adams	Pope & Talbot
Frank Domingo	Parr Richmond Terminal
S. J. Meyer	Parr Richmond Terminal
W. L. Treverton	Knutsen Line
H. B. Harris	Knutsen Line
H. B. Harris	Lino Lines
Ian Back	Union SS Co. of N.Z., Ltd.
R. Fielding	Balfour, Guthrie & Co., Ltd.
R. Fielding	Flota Mercante Grancolombiana
R. Fielding	North German Lloyd
R. Fielding	Hamburg Amerika Line
Robert Douglas	Encinal Terminals
C. R. Redlich *	*Marine Terminals Corporation
E. G. Horsman *	*Marine Terminals Corp., of L. A.
	*General Stevedore & Ballas
	*Bulk Handlers
Daniel K. Moore	Star Terminal Co.
Daniel K. Moore	Canadian Gulf Line
David Gregory	Olympic Griffiths Lines
David Gregory	Olympic Steamship Co., Inc.
David Gregory	Salmon Terminals, Inc.
W. G. Fahy, Jr.	S. F. Stevedoring Co.
C. H. Gielow	S. F. Stevedoring Co.
H. A. Gade	S. F. Stevedoring Co.
Guy Flandreau	French Line
George B. Schirmer	Schirmer Steve. Co.
George B. Schirmer	Ocean Terminals
George B. Schirmer	Yerba Buena Corporation
George B. Schirmer	Oregon Steve. Co.

Exhibit 2-O

Messrs.	*Company*
L. R. Richards	Overseas Shipping Co.
John D. Knox	Weyerhaeuser Steamship Co.
John D. Knox	Independent Stevedore Co.
John D. Knox	Humboldt Stevedore Co.
L. R. Richards	Fern-Ville Lines
L. R. Richards	Klaveness Line
L. R. Richards	Barber Line
Allan K. Hulme **	**Pacific Orient Express Line
J. R. Page **	**Pacific Islands Transport Line
	**Italian Line
	**French Line
	**Daido Line

Also Present:

R. W. Cabell	International Shipping Co.
Clyde Jacobs	Crown Zellerbach Corp.
L. R. Schinazi, Jr.	Overseas Central Enterprise, Inc.
R. Thaning	Transatlantic S.S. Co.
C. C. Martin	The Standard Slag Co.
R. F. Hubbard	Cargill Inc.

[3] Staff:

Messrs. J. Paul St. Sure
B. H. Goodenough
K. F. Saysette
Richard Ernest
J. H. Travers
Pres Lancaster
J. A. Robertson

A quorum being present the meeting was called to order by the Chairman at 10:00 A.M.

DETERMINATION AS TO METHOD OF CONTRIBUTION TO ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND: The Chairman reported that the Board of Directors had previously approved the Agreement between the PMA

and ILWU of October 18, 1960, but had left the question of the method of contributions to the Fund for membership action.

A Sub-Committee to recommend the method of funding has been working for approximately two months and reported to the Board of Directors at its meeting on January 6, 1961. The Board of Directors after considering the Majority and Minority Report of the Sub-Committee voted: "That the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months, and during this interim further studies will be made on this subject."

Considerable discussion then developed concerning the Majority and Minority recommendations of the Committee and the position of the bulk carriers.

It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued [4] study and be presented to the Membership again in six months.

The Chairman explained the three recommendations which had been made:

1. *Majority Report* (on which the motion is based)
   26¾¢ on general cargo
   5½¢ on bulk

2. *Minority Report*
   10¢ a ton
   12¢ per manhour

3. *Board of Directors*
   20¢ a ton

Exhibit 2-O

It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

At this time a secret ballot was taken and the vote was polled as follows:

246	yes
74	no
21	withheld
67	absent

Motion carried by a majority of the total voting strength of the Association Membership.

The Chairman announced that the motion would be construed to mean that if a different method of contribution should be adopted 6 months hence, it would not have retroactive application.

RATIFICATION OF ILWU-PMA AGREEMENT:

It was moved, seconded and unanimously carried by voice vote that the Agreement of October 18, 1960, between the PMA and ILWU be ratified.

Meeting adjourned at 11:50 A.M.

/s/ J. A. ROBERTSON
J. A. Robertson
Secretary

JAR:ah

Exhibit 2-P

(Minutes of Meeting
of
Board of Directors
Pacific Maritime Association)

[1] Meeting No. 1

Time: January 6, 1961—10:00 A.M.

Place: 16 California Street, Room 202

Present: *Directors*

Messrs. W. B. Adams
J. Wyand
Clarence Morse
S. F. Alioto
David Lindstedt
George Schirmer
Harmon K. Howard

Alternates

Messrs. Dale Collins
W. L. Horvitz
John Knox
David Gregory
E. H. Gluck
J. W. Dickover
J. F. Byrne
C. E. Luddy
C. H. Gielow
C. R. Redlich
G. T. Littlejohn

Exhibit 2-P

Also
Present: Messrs. Hubert Brown
E. L. Bargones
F. Weldon
O. Porton
P. Tiege
L. Richards
J. Page
E. F. Ebey
J. Feragen
I. Back

Staff: Messrs: J. Paul St. Sure
B. H. Goodenough
K. F. Saysette
P. Lancaster
R. Ernst
J. A. Robertson

[2] A quorum being present the meeting was called to order by the chairman at 10:10 A.M.

APPLICATIONS FOR MEMBERSHIP: Letter of application dated December 28, 1960, has been received from Kawasaki Kisen Kaisha, Ltd. (Kerr Steamship Company, Inc., General Agents) and letter of application dated January 4, 1961, has been received from Iino Lines (Bakke Steamship Corporation, Agents.)

It was moved, seconded and unanimously carried that these companies be admitted as members of the Association.

RECOMMENDATION AS TO METHOD OF CONTRIBUTION TO ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND: The Chairman reported the ILWU had formally ratified the Agreement and as a result the Association is under considerable pressure to determine the method of assessment for contributions to the Fund, as well as ratification of

Exhibit 2-P

the Agreement. The Coast Steering Committee has been meeting on the details of the new Agreement, having met yesterday for an all day session and will meet again this afternoon.

The Board of Directors has received copies of the Sub-Committee report as to the method of funding. The report consisted of two documents—a Majority and Minority Report.

A Membership Meeting has been called for Tuesday morning, January 10, 1961, at 10:00 A.M.

Considerable discussion then developed as to the recommendations of the Majority and Minority of the Sub-Committee.

It was moved and seconded that the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months, and during this interim further studies will be made on this subject.

[3] Vote on the motion:

Yes	12
No	3
Withheld	3

Motion carried.

Meeting adjourned at 11:50 A.M.

/s/ J. A. ROBERTSON
J. A. ROBERTSON
Secretary

JAR:ah

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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONER,

vs.

FEDERAL MARITIME COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 20, 1967
CERTIORARI GRANTED JUNE 12, 1967

JOINT APPENDIX

(Vol. II—Pages 381-750, Incl.)

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 19,840

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition to Review and Set Aside Order of the Federal Maritime Commission

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Exhibit 3

(BY-LAWS AS AMENDED OF PACIFIC MARITIME ASSOCIATION

INCORPORATED JUNE 3, 1949—APRIL 1960)

[3] BY-LAWS

AS AMENDED

OF

PACIFIC MARITIME ASSOCIATION

ARTICLE I.

The corporate powers, business and Board of property of this corporation shall be Directors vested in and exercised, conducted and controlled by a Board of twenty-one (21) Directors, who need not be members of the corporation.

ARTICLE II.

Officers

The officers of the corporation, none of whom need be a member of the Board of Directors, shall consist of a president, three vice presidents, a secretary, a treasurer, and such other officers as the Board of Directors shall from time to time create. All of the officers of the corporation shall hold office at the pleasure of the Board of Directors.

Exhibit 3

ARTICLE III.

Powers and Duties of Directors

Section 1. The powers and duties of the Board of Directors are:

(a) To appoint and remove at pleasure all officers, agents and employees of [4] the corporation, other than directors, prescribe such duties for them as may not be inconsistent with law and these by-laws, fix their compensation and require from them security for faithful service;

(b) To conduct, manage and control the affairs and business of the corporation, and to make such regulation therefor, not inconsistent with law and these by-laws, as they may deem best;

(c) To approve and admit to membership persons, firms, associations or corporations, qualified therefor under the provisions of the Articles of Incorporation of this corporation and these by-laws;

(d) To borrow money and incur indebtedness for the purpose of the corporation, and to cause to be executed and delivered therefor in the name of the corporation promissory notes and other evidence of debt;

(e) To levy and assess and collect, or provide for the collection of, dues or assessments in accordance with the provisions of these by-laws; but the Board of Directors shall not have the power to levy, assess or collect dues or assessments in excess of a maximum rate to [5] be fixed, at a regular or special meeting, by the vote of members holding a majority of the voting power of the entire membership;

(f) To prepare, approve and file with the secretary a roster of the membership, classified in accordance with the provisions of Article IV, Section 3 and to prepare, approve

and file with the secretary a roster of the membership of each port area defined herein in accordance with the provisions of Article VIII, Section 2, hereof;

(g) To transact all of the affairs of the corporation.

Article IV.

Qualifications of Members

Section 1. Any firm, person, association or corporation engaged in the business of carrying passengers or cargo by water to or from any port on the Pacific Coast of the United States (except Alaskan ports), or any agent of any such firm, person, association or corporation, and any firm, person, association or corporation employing longshoremen or other shoreside employees in operations at docks or marine terminals at any such port and any association or corporation composed of employers of such longshoremen or other shoreside employees [6] shall be eligible for membership in this corporation.

Membership Groups

Section 2. For the purposes of representation on the Board of Directors, convenience in group consideration of corporate problems and activities, and determinations of voting power, the members shall be organized into eight (8) groups as follows:

Passenger Line Group

(a) The passenger line group, consisting of members operating American flag passenger vessels as defined in the navigation laws of the United States to or from Pacific Coast ports, and member agents of non-members engaged in such operation.

Exhibit 3

Intercoastal Line Group

(b) The intercoastal line group, consisting of members engaged in the operation of vessels carrying freight between ports on the Pacific Coast and ports on the Atlantic or Gulf Coasts of the United States, and member agents of non-members engaged in such operation.

Coastwise Group

(c) The coastwise group, consisting of members engaged in the operation of vessels carrying freight between ports of the Pacific Coast north of Mexico (except on voyages between ports of Puget Sound and ports in Alaska), and member agents of non-members engaged in such operation.

[7] *Alaska Area Group*

(d) The Alaska area group, consisting of members engaged in the operation of vessels on voyages between ports of Puget Sound and ports in Alaska, and member agents of non-members engaged in such operation.

Offshore Group

(e) The offshore group, consisting of members engaged in the operation of American flag vessels carrying freight between ports on the Pacific Coast of the United States and foreign ports or Hawaii or ports in the Island Territories, or possessions of the United States, and member agents of non-members engaged in such operation.

Foreign Line Group

(f) The foreign line group, consisting of members engaged in the operation of foreign flag vessels to or from any port on the Pacific Coast of the United States except

Alaskan ports, and member agents of non-members engaged in such operation.

Stevedore Group

(g) The stevedore group, consisting of members engaged in the business of loading or discharging dry cargo vessels at any port on the Pacific Coast of the United States, except Alaskan ports.

Terminal Group

(h) The terminal group, consisting of members engaged in the operation of any marine terminal at a port on the [8] Pacific Coast of the United States, except Alaskan ports.

Membership Classification and Roster

Section 3. Members shall be classified in any one or more of the groups referred to in this Article in accordance with their respective operations and activities, each member being eligible to be classified in any one or more of such groups for which its operations or activities may qualify it, and the Board of Directors shall cause to be prepared, approved, and filed with the secretary, a roster of the membership classified in accordance with the provisions of this Article, and shall cause such roster to be amended from time to time to reflect the membership of each of said groups.

ARTICLE V.

Director Representation

Section 1. The Directors shall be twenty-one (21) in number; they shall be selected as follows:

Two by the passenger line group, three by the intercoastal line group, one by the coastwise group, one by the Alaska area group, four by the offshore group, two by the

foreign line group, two by the stevedore group, two by the terminal group; and one by each of the area memberships.

Alternate Directors

Each Director shall by written designation filed with the Secretary of this [9] Corporation name his alternate, which designation may be revoked or changed at any time by written notice filed with the secretary at any meeting of the Board of Directors; in the absence of a Director, his alternate shall constitute a Director in his place and stead and shall exercise all of the duties, powers and functions of such absent Director at such meeting.

Selection of Membership Group Chairman

Section 2. Each of the membership groups (not limited to those specified in Article IV, Section 2) shall appoint its own chairman, and, in the case of an area membership, the said chairman shall also be chairman of the executive committee for such area, and establish its own rules of procedure for the selection of Directors and consideration of such matters as may come before the group for consideration. Notwithstanding the provisions of Article VI, in the selection of Directors, each member of the group shall be entitled to one vote and to one vote only.

Selection of Directors

Section 3. Directors shall be selected annually, on or before the first day of March of each year. Meetings shall be held of the memberships of the passenger line group, the intercoastal line group, the coastwise group, the Alaska group, the offshore group, the foreign [10] line group, the stevedore group and the terminal group and of the memberships of the port areas of Southern California, of Northern California, of Oregon and Columbia River and of Washington at which Directors shall be selected and each such membership shall cause the Directors selected at such meeting to be certified in writing to the Board of

Directors and the membership at or before the annual meeting of members. The directors so selected shall take office at the conclusion of the annual meeting of members and shall hold office until the next succeeding annual meeting of members or until election of their successors.

Vacancies in the Board of Directors

Section 4. When any vacancy occurs in the office of Director, such vacancy shall be filled by the group which selected the Director.

Section 5. A vacancy in the Board of Directors shall be deemed to have occurred whenever a Director resigns, which he may do either by presenting his written or oral resignation to the Board or by mailing or telegraphing his resignation to the corporation, or whenever a Director dies, or by judgment of a competent court is declared incompetent or insane, or whenever any vacancy is created in accordance with [11] any law of the State of California. Unless otherwise provided herein, any such resignation shall become effective when presented, mailed or telegraphed as aforesaid.

ARTICLE VI.

Voting Power

Section 1. Each member of this corporation shall have one vote. In addition each member shall have one vote for each full one hundred thousand (100,000) tons (or such other unit of measurement as the Board of Directors may designate for cargo of which tonnage is not an appropriate measure) of cargo loaded and/or discharged by or for such member or its principal during the preceding calendar year at Pacific Coast ports of the United States other than Alaska ports to or from vessels owned, operated or managed by such member; provided, however, that in determining the tonnage of cargo handled by any member in the stevedore group or the terminal group there shall be excluded

the cargo handled by it for any member in any other member group; and each member of the passenger line group, coastwise group, intercoastal line group, Alaska group and offshore group shall have in addition a number of votes equal to the average number of seafaring employees employed under [12] collective bargaining contracts executed on behalf of such member by the corporation (or in respect to whom the corporation has been authorized by such member to conduct collective bargaining in its behalf) on vessels operated by such member during the preceding calendar quarter year divided by one hundred.

Certification of Tonnage and Personnel

Section 2. The Board of Directors shall have the power by resolution to establish general rules for the purpose of ascertaining and determining for voting purposes, the tonnage (or other measurement designated by the Board of Directors) of cargo handled and average employment of seafaring personnel. Each member shall report to the secretary of the corporation on or before the 20th day of each month the tonnage (or other designated measurement of cargo) loaded or discharged by or for such member at Pacific Coast ports of the United States other than Alaska ports during the preceding calendar month (agent members reporting separately the tonnage or other designated measurement of cargo so loaded or discharged on behalf of the principals on whose behalf they are acting as members), and the secretary shall certify to the Board of Directors in advance of the annual meeting the tonnage or other [13] designated measurement of cargo so loaded and/or discharged by or for each voting member during the preceding calendar year and the tonnage or other designated measurement of cargo so loaded and/or discharged for principals on whose behalf agent members are acting during such preceding calendar year; and each member of the passenger line group, coastwise group, Alaska group, intercoastal line

group and offshore group shall report to the secretary of the corporation on or before the 20th day of each month the number of seafaring employees employed by it under contracts executed on its behalf by the corporation (or in respect to whom the corporation has been authorized by such member to engage in collective bargaining on its behalf) on vessels operated by such member during the preceding calendar month, and promptly after the expiration of each quarter of each calendar year the secretary shall report to the Board of Directors the average number of such seafaring employees so employed on vessels of each such member during the preceding quarter. The Board of Directors shall, based upon such reports of the secretary and any other source which the Board of Directors shall deem proper, determine [14] from time to time as may be necessary for voting purposes, the tonnage or other designated measurement of cargo so loaded and/or discharged by each member and the average number of such seafaring personnel so employed, which determinations shall be final and conclusive upon all members.

Article VII.

Regular Directors' Meetings

Section 1. Meetings of the Board of Directors shall be held either at the office of the corporation or at any other place which may be designated by resolution of the Board of Directors. Regular meetings of the Board of Directors shall be held on the second Wednesday of each March, June, September and December at 10:00 o'clock A.M., without other or further notice than this by-law; provided, however, that should said meeting day at any time fall upon a legal holiday such meeting shall be held on the next day thereafter which is not a legal holiday at the same hour and place. A majority of the Board shall constitute a quorum for the transaction of business.

Exhibit 3

Special Directors' Meetings

Section 2. Special meetings of the Board of Directors may be called at any time by order of the President or any Vice-President of the corporation or [15] four (4) Directors. Notice of a special meeting of the Board of Directors shall state the nature of the business to be transacted and be given each Director by mailing notice thereof, at least four (4) days prior to the date of meeting, addressed to each Director at his place of business or residence as the same appears on the books of the corporation, or, in case no business or residence address of such Director appears on the books of the corporation, then directed to any address appearing on such books for such Director.

Emergency Directors' Meetings

In the event that the President or any Vice-President of the corporation, or any four (4) Directors thereof, shall determine that an emergency exists requiring an immediate meeting of the said Board of Directors, notice thereof may be given not less than twenty-four (24) hours prior to the hour set for said meeting by notice transmitted to the place of business of each Director either by telephone or telegraph. No notice other or further than that specified in this Section shall be required. Anything which may be done at a regular meeting of the Board of Directors may be done at a special or an adjourned meeting of the Board.

Section 3. At any meeting of the [16] Board of Directors every act or decision done or made by a majority of the Directors present shall be regarded as the act of the Board of Directors. In the absence of a quorum a majority of the Directors present may adjourn from time to time until the time fixed for the following regular meeting of the Board.

Exhibit 3

ARTICLE VIII.

Executive Committees

Section 1. There shall be created one Coast Executive Committee and four (4) Area Executive Committees to exercise such power and authority of the Board of Directors in the management of the business and affairs of the corporation as the Board of Directors shall determine, except the power to levy dues or assessments, all subject to the authority and control of the Board of Directors. Each Executive Committee shall have power to establish rules governing its own proceedings, including the establishment of its place of meeting, any regular time of meeting and other rules concerning its procedure. Minutes shall be kept of all proceedings of any Executive Committee to be incorporated in and become a part of the minutes of the Board of Directors.

Coast

Section 2. The Coast Executive Committee shall consist of seven directors [17] to be appointed by the Board of Directors from its members and in addition to ex-officio members as hereinafter provided. Each member of the Coast Executive Committee shall designate in writing an alternate to act as a member of the Coast Executive Committee in the absence of the member appointing him. Upon the approval by the Board of Directors of any alternate so designated he shall be entitled to act as a member of the Coast Executive Committee in the absence of the member so designating him. Such alternate may be changed at any time by written designation of the member appointing such alternate with the approval of the Board of Directors.

Exhibit 3

Area

Each Area Executive Committee shall consist of not less than seven (7) nor more than ten (10) members to be selected by the membership in the Port Area. There shall be an Area Executive Committee for the Port Area of Southern California, one for the Port Area of Northern California, one for the Port Area of Oregon and the Columbia River, and one for the Port Area of Washington.

The membership of the Port Area of Southern California shall consist of those members doing business either [18] directly or through agents at ports in California, south of and including the Port of Hueneme, which ports are designated the Southern California Port Area.

The membership of the Northern California Area shall consist of members doing business either directly or through agents in ports of California north of Port Hueneme, which ports are designated as the Northern California Area.

The membership of the Oregon and Columbia River Port Area shall consist of members doing business either directly or through agents in ports in the State of Oregon and on the Columbia River, which ports are designated as the Oregon and Columbia River Area.

The membership of the Washington Area shall consist of members doing business either directly or through agents in ports in the State of Washington, excluding the Columbia River, which ports are designated as the Washington Area.

Selection

The selection of such Area Executive Committees shall be at meetings of the respective port area memberships called and held at such times and places and on such notice as the Board of Directors [19] shall prescribe, at which meetings each port area member shall be entitled to one vote. Each port area membership shall have power to estab-

lish rules governing its own proceedings not inconsistent with the provisions of these By-Laws or of any resolution of the Board of Directors relating thereto.

Roster

The Board of Directors shall cause to be prepared, approved and filed with the secretary a roster of the membership of each port area defined herein and shall cause such roster to be amended from time to time to reflect the membership of each of said groups.

Section 3. The Chairman of each Area Executive Committee shall be ex-officio, a member of the Coast Executive Committee.

ARTICLE IX.

President

The President shall preside at all meetings of the Board of Directors and of the members and of all committees except Area Executive Committee; he shall sign as President of the Corporation all deeds, mortgages, leases, promissory notes and contracts, and other instruments that may require such signature, unless the Board of Directors [20] shall otherwise direct; and he shall perform such other duties as the Board of Directors may determine.

Vice Presidents

Each Vice-President shall exercise such authority and perform such duties as the Board of Directors shall, from time to time, by resolution prescribe.

Secretary

The Secretary shall keep a record of the proceedings of the Board of Directors and of meetings of the members, and such other records and minutes as the Board of Directors

shall require; he shall keep the records of the corporation, sign in conjunction with the President or any Vice-President, checks, drafts, notes and other instruments, unless the Board of Directors shall otherwise direct, and generally perform such duties as pertain to his office, and as may be required by the Board of Directors or by the President.

Treasurer

The Treasurer shall receive any monies belonging to or paid in to the corporation and deposit the same as the Board of Directors shall require; he shall supervise the accounts and books of the corporation and perform such other duties as the Board of Directors shall prescribe.

The offices of Secretary and Treasurer may, at the discretion of the Board of Directors be held by one person.

[21] ARTICLE X.

Membership Meetings
Annual Meeting

Section 1. There shall be a regular annual meeting of the members of the corporation on the second Wednesday in March of each year, at 2:00 o'clock P.M., at the office of the corporation; provided, however, that should said meeting day fall upon a legal holiday, said meeting of the members shall be held on the next day thereafter which is not a legal holiday, at the same hour and place. Notice of the annual meeting of members shall be given by mailing notice thereof stating the nature of the business to be transacted at least five (5) days prior to the date of meeting, addressed to each of the members of the corporation at his or its place of business or residence as the same appears on the books

of the corporation, or, in case no business or residence address of a member appears on the books of the corporation, then directed to any address appearing on the books for such member. No other or further notice shall be required.

Special Meetings

Section 2. Special meetings may be called and held at any time by order of the President or four (4) members of the Board of Directors, or ten (10) members of the corporation, by notice, stating the nature of the business to be [22] transacted at the meeting, given in either of the two following manners:

1. By a four days' notice in writing given to all members in the manner provided in Section 1 of this Article; or

2. By notice transmitted to the place of business of each member by telephone or telegraph at least twenty-four (24) hours prior to the hour fixed for said meeting. The latter form of notice shall be given only if the President or four (4) members of the Board of Directors, or ten (10) members of the corporation, shall determine that an emergency exists requiring an immediate meeting of the members.

Section 3. It shall be the duty of the Secretary, upon demand of the President or four (4) members of the Board of Directors or ten (10) members of the corporation, to prepare and send notice of any special meeting to each member of the corporation in accordance with Section 2 of this Article.

Quorum

Section 4. At all meetings of the members, persons representing a majority of the voting power of the membership, either in person or by proxy in writing, or by telegraph, shall constitute a quorum.

Exhibit 3

Membership Groups Meetings

[23] Section 5. Meetings of one or more of the membership groups (not limited to those specified in Article IV, Section 2) may be called and held at any time in like manner and upon like notice as special meetings of the entire membership. Members holding a majority of the voting power of the group or groups for which any such meeting is called, either in person or by proxy in writing or by telegram, shall constitute a quorum.

ARTICLE XI.

Powers of Corporation

Section 1. Subject to the provisions of Section 8 hereof, this corporation shall have power to establish policies for its members and the corporation in all matters relating to labor contracts and labor controversies and, subject to the provisions of Sections 2 and 3 of this Article, shall have power to represent and act on behalf of its members in any negotiations carried on by the corporation on behalf of its members with unions of longshoremen or other employments ashore and with unions of seamen, and any contracts, commitments or undertakings made by this corporation on behalf of its members with any union shall bind the members of this corporation; provided, however, that this corporation shall be without [24] power to bind any of its members other than passenger lines, coastwise lines, intercoastal lines, Alaska lines, and offshore lines by any contract with or commitment to any union of seamen or seafaring personnel; provided further, that this corporation shall be without power to bargain or contract with or to make any undertaking to any union of seamen or seafaring personnel on behalf of a member which has not authorized the corporation to act on its behalf in bargaining with such union; provided further, that this corporation shall be without power

to bargain or contract with any union of seamen or seafaring personnel with respect to wages, hours or working conditions of the crews of tankships, or crews of vessels of the foreign line group.

Labor Practice

Section 2. Notwithstanding any other provision of these By-Laws, this corporation shall be without power to contract with or make any commitment to any union, and no contract, commitment or undertaking which would impose any personal obligation or liability on the members of this corporation shall be made or entered into by this corporation, until and unless such contract, commitment or undertaking has been approved, at a regular or special meeting of the members, by vote of members [25] holding a majority of the voting power of the entire membership and, if such contract, commitment or undertaking relates to seafaring personnel, has been approved by the vote of members holding a majority of the combined voting power of members in the passenger line, intercoastal line, coastwise, Alaska area, and offshore groups, which shall have authorized the corporation to act in their behalf in respect thereto; or unless such contract, commitment or undertaking shall have been made or entered into by this corporation pursuant to a delegation of authority conferred by similar votes.

Liability of Members

Section 3. A member who has not authorized or accepted in writing such contract, commitment or undertaking and who has not voted in favor of the approval thereof or the delegation of authority with respect to the particular terms thereof shall not be bound by such contract, commitment or undertaking, if such member resigns within seven (7) days after the date of the vote thereon, whether taken in advance

of or during the negotiations, or subsequent to the drafting of the contract, agreement or commitment in final form and submission to the membership for approval.

[26] Section 4. No member becoming bound in respect of any contract, commitment or any other undertaking made by this corporation shall be under any liability with respect to any act taken or omitted hereunder by any other member.

Violation of Corporation Policy

Section 5. If any member shall violate, directly or indirectly, any rule or policy established by this corporation, or procure, encourage or assist in any such violation by any other person, whether a member of this corporation or not, or shall, directly or indirectly, violate any provision of any contract or agreement made by the corporation on its behalf with any longshoremen or other employees ashore or unions thereof, or with any seamen or unions thereof, or procure or encourage or assist in any such violation by any other person, whether a member of this corporation or not, or shall violate any other provision of these By-Laws, then, in any such event, the Board of Directors shall have the power, in its discretion, to suspend any such member for such period of time as the Board of Directors shall prescribe or to expel such member from membership in this corporation; and in addition, in any such event, that is a violation of a "rule of labor policy" adopted with such designation [27] by the Board of Directors of the corporation, such a member shall be liable to the other members who do not participate in such violation for their damages resulting from such violation. The members and the corporation recognize and acknowledge that compliance with the policies established by the corporation for its members and the corporation in matters relating to labor contracts and labor controversies and compliance with contracts commitments or undertakings made by this cor-

poration on behalf of its members with any labor union or organization are essential to the achievement of the purposes of the corporation in carrying on labor relations and in order to prevent injuries to the members that may be of long duration and great severity and may develop at great distances from the violation and after considerable delay and that it would be extremely difficult, if not impracticable or impossible, to fix the actual expense and damage to each of the members of the corporation that would result from any violation of a member. Therefore, the amount of damage resulting from any violation of such a "rule of labor policy" shall be payable to the corporation for the account of such members and by [28] way of liquidated damages and not as a penalty, as follows:

(a) Liquidated damages in the sum of $5,000 for entering into or continuing in effect any contract, commitment or undertaking with any union or labor organization or group of employees or individual employee that is contrary to any such "rule of labor policy," except to the extent that such contract, commitment or undertaking is outside of the field within which such member shall have authorized this corporation to act in its behalf as recognized under Section 8 hereof.

(b) The sum of $100 for each day of employment of each employee who is employed or paid in accordance with wages, hours or other terms or conditions of employment that is contrary to any such "rule of labor policy," except to the extent that such employment is outside of the field within which such member shall have authorized this corporation to act in its behalf as recognized under Section 8 hereof.

(c) The sum of $5,000 for any other violation of any such "rule of labor policy," except to the extent

[29] such "rule of labor policy" is not binding on such member as recognized in Section 8 hereof.

Upon a claim's being made to the Board of Directors of the corporation that any member has committed a violation within the meaning of (a), (b), or (c) above, the Board of Directors shall cause investigation to be made with respect to the facts and shall determine whether or not a violation has occurred and the amount of liquidated damages to be assessed in accordance with the above provisions. A member who is claimed to have been in violation shall be given written notice of the alleged violation and of the investigation to be had with respect thereto and shall be given opportunity to appear and be heard by the Board of Directors and any agent of the Board of Directors carrying on an investigation, such appearance to be through any regular officer of the company who participates in meetings of the Association. The corporation is authorized to act on behalf of members in collecting the liquidated damages provided for herein and may use whatever means to this end it deems proper, including civil action if any member fails to pay liquidated damages as determined by the Board [30] of Directors within ten days after receipt of written demand therefor from the corporation. Should an action in court be instituted, the member in violation shall pay all costs of such litigation, including court costs, reasonable attorney's fees and all other expenses of the corporation and its counsel in connection with the collection of such liquidated damages.

Any member who commits an act that is a violation as defined in (a), (b), or (c) above shall be liable for liquidated damages as specified herein even though said member may have resigned from the corporation or have been suspended or expelled from the corporation prior to the time that the fact of violation and the amount of liquidated damages has

been determined in accordance with the procedures set forth herein.

Violation of Contracts

Section 6. If any union, its members or officials, shall violate any labor contract or award relating to wages, hours or working conditions to which contract or award this corporation is a party, or in the negotiation or administration of which contract or award this corporation has acted for a member or members, whether such violation shall be by strike, stoppage of work or in any other manner, any member affected [31] thereby shall notify the corporation. All appropriate means for peaceful settlement of any such matter shall be pursued with the appropriate officers of the union or unions involved in an endeavor to secure compliance with the terms of such agreement or award. If compliance is not secured, a meeting of the members of this corporation shall forthwith be called and all members of this corporation shall take whatever action shall be determined by a vote of the members holding at least a majority of the voting power of the membership; provided that there shall be no suspension or termination of any such contract or agreement for breach thereof without consent of members representing at least two-thirds of the voting power of the class or classes of members bound by such contract or agreement; provided further that written notice of any such vote or consent shall be immediately given by registered mail to all members and no such vote or consent shall bind any member who did not join therein and who resigns within seven (7) days after the date of mailing such notice.

Financial Assistance to Members

Section 7. If any labor union or association of working men or any members of such union or association shall vio-

late any agreement with this corporation, [32] or any agreement in the negotiation or administration of which this corporation has acted for a member or members, the Board of Directors shall, upon application, cause investigation to be made, and if the Board of Directors shall find that such union or association is at fault, and fails or refuses to make reparation or otherwise remedy such violation or refusal to the satisfaction of the Board of Directors, and if this corporation after investigation shall desire to resist the demands of such union or member thereof, this corporation shall render to such member or members of this corporation the fullest moral support, and shall pay such expenses incurred by such member in any strike, lockout or other labor trouble caused by such action of the union, association or member or members thereof, as shall be approved and limited by the Board of Directors of this corporation in advance.

If any labor union or association of working men or any members of such union or association shall take economic action directed against this corporation or its members, or any one or more of its members, in connection with any policy established under Section 1 of this Article for this corporation and its members in any matter relating to [33] labor contracts and labor controversies, the Board of Directors upon application shall cause an investigation to be made and, if the Board of Directors shall find that such union or association is at fault and fails or refuses to cease such economic action or to make reparation or otherwise remedy such economic action to the satisfaction of the Board of Directors and if this corporation after investigation shall desire to resist the demands of such union or association or member or members thereof, this corporation shall render to such member or members of this corporation the fullest moral support and shall pay such expenses incurred by such member in any strike, lock-

out, or other labor trouble caused by such action of the union, association, or member or members thereof, as shall be approved and limited by the Board of Directors of this corporation in advance.

If any member or members of this corporation shall have, by reason of their compliance with a labor policy established by this corporation, incurred expenses in the defense of such labor policy, or have been subjected to loss due to liability under law, and if this corporation after investigation and in accordance with policies to be laid [34] down by the Board of Directors determines that such loss and expenses should be assumed by this corporation because such member or members have incurred such losses or expenses as the result of compliance with a labor policy of the Association and have thereafter complied with the procedures laid down by the Board of Directors with respect to such loss or liability, this corporation shall render to such member or members of this corporation the fullest moral support and shall pay such expenses and reimburse such losses incurred by such member or members as shall be approved and limited by the Board of Directors of this corporation.

No personal obligation or liability on the part of any member of the corporation shall accrue under this Article XI or by virtue of any action taken by the corporation hereunder, provided, that the foregoing shall not be deemed to affect the power of the Board of Directors to levy assessments in the manner provided in Article XIII of these By-Laws for the purpose of rendering assistance to members as permitted by Article XI.

Members Not Bound

Section 8. Notwithstanding any other provision of these By-Laws, no foreign line member and no other member which shall not have authorized this [35] corporation to act

in its behalf in bargaining with a union, or unions, of seafaring personnel shall be bound by any policy established by this corporation in connection with labor contracts or labor controversies affecting or respecting seamen or seagoing personnel.

ARTICLE XII.

Initiation Fee

Each member shall pay an initiation fee which shall be not less than Two Hundred Fifty Dollars ($250.00) and shall be such amount as may be required to insure a contribution to the assets of the corporation which will bear to the corporation's current assets a proportion substantially equivalent to the voting power of the new member; and the Board shall take into consideration in fixing such initiation fee any contribution theretofore made indirectly to the assets of the corporation.

ARTICLE XIII.

Dues and Assessments

Section 1. The members shall pay such dues and assessments as shall be fixed or levied by the Board of Directors in accordance with the provisions of this Article. Such dues and assessments shall consist of the following:

Cargo Dues

(a) Assessments to be fixed from time to time by the Board of Directors [36] measured by (1) each ton of cargo (or such other unit of measurement as the Board of Directors may determine to be equivalent in instances where the Board shall determine that the ton is not an appropriate unit of measurement) loaded or discharged at Pacific Coast ports of the United States other than Alaska ports by or for members or for any other firm, person, association or corporation not a member of this corporation; and (2) the man

hours of work performed by persons employed under the terms of collective bargaining agreements executed by this corporation, or its predecessors, or dispatched from hiring halls or other such facilities maintained and operated by this corporation in whole or in part, or by a union party to any such collective bargaining agreement. In fixing and levying the above assessments, the Board of Directors in its discretion may use either or a combination of the above bases. All sums delivered by the corporation from such assessments shall be known as "cargo dues."

Shipping Dues

(b) Assessments to be fixed by the Board of Directors from time to time measured by the average number of seamen or seafaring employees employed by any member company under contracts executed on its behalf by this [37] corporation, or in respect to which this corporation is authorized to bargain on behalf of such member during such period, as the Board of Directors shall fix, and all sums derived by the corporation from such assessment shall be known as "shipping dues," and

Payroll Dues

(c) Assessments to be fixed from time to time measured by the payroll costs of member companies in the respective port areas defined in Article VIII herein for the employment of dock or terminal labor under contracts to which this corporation is a party, such rate in each port area to be such as the Area Executive Committee with the approval of the Board of Directors deems appropriate and necessary to defray the cost of services of a local area nature carried on at the expense of this corporation, and all sums derived from such assessments shall be known as "payroll dues."

Exhibit 3

Directors' Determination of Dues

Section 2. In fixing and levying that portion of the cargo dues assessed according to tonnage handled, the Board of Directors may establish different rates per ton, or other measurement unit for different classes of cargo and different rates per ton or other measurement unit applicable to different loading or discharging handling conditions, and the Board of Directors shall also [38] fix rules for calculation of the tonnage or other measurement units loaded, discharged, and/or handled, by or for members of the corporation. In fixing and levying that portion of said cargo dues assessed according to man hours of employment, the Board of Directors shall establish rules and regulations necessary for the calculation thereof. In fixing and levying shipping dues, the Board of Directors shall establish rules for the calculation of the average number of seamen or seafaring employees employed by member companies. In fixing and assessing payroll dues, the Board of Directors shall establish rules to be uniformly applied for the purpose of determining payroll costs and the manner of calculation of the dues measured thereby. The determinations of the Board of Directors in respect to all of the matters specified in this Section shall be final and conclusive.

Membership Approval

Section 3. The foregoing provisions of this Article XIII and the rules fixed thereby governing dues and assessments may be changed and other and different rules governing dues and assessments may be established by resolution of the Board but only after approval thereof by vote of members holding a majority of the voting power of the entire membership [39] at a regular or special meeting of the members, in the notice of which the substance of the resolu-

tion of the Board of Directors to be approved shall have been stated.

Minimum Dues and Assessments

Section 4. Three Hundred Dollars ($300.00) per year is hereby fixed as the minimum dues and assessments of each member for each fiscal year ending June 30. On June 30 of each year each member which shall have paid as dues and assessments for the preceding full fiscal year of membership less than Three Hundred Dollars ($300.00) shall pay theretofore the difference between Three Hundred Dollars ($300.00) and the total dues and assessments paid by such member for such year.

Notice

Section 5. Notice of any action taken by the Board of Directors with respect to dues or assessments shall be sent to the members promptly by registered mail and shall not become effective until seven (7) days after such mailing. No member who resigns from the corporation prior to the effective date of such action shall be bound thereby.

Separate Accounts

Section 6. The corporation shall maintain on its books separate accounts as follows:

Cargo Dues Account

(a) An account consisting of all sums derived by the corporation from cargo [40] dues, and which account shall be used only for the expenses of the corporation in connection with or relating to the negotiation, execution, administration and performance of contracts affecting shore labor and other matters affecting the interests of members in connection with shore labor, and a fair and reasonable percentage of overhead and general administrative and miscel-

laneous expense incurred for the benefit of the membership of the corporation as a whole.

Shipping Dues Account

(b) An account consisting of all sums derived by the corporation from shipping dues, which account shall be used only for the expenses of the corporation in connection with or relating to negotiation, execution, administration and performance of contracts affecting seafaring labor, and other matters affecting the interest of members in connection with seafaring labor, and a fair and reasonable percentage of overhead and general administration expense incurred for the benefit of the membership of the corporation as a whole, provided that in no event will shipping dues be assessed against or collected from the foreign line members.

Port Area Payroll Dues Accounts

[41] (c) A separate account for each Port Area, consisting in each case of all sums derived by the corporation from payroll dues assessed in such Area, each of which accounts shall be used only for the expenses of the corporation in connection with the furnishing of services to members of a strictly local character (other than services in negotiating and administering collective bargaining contracts), such as maintenance of a central pay office, collective tax reporting, and other services for the benefit of the direct employers of shore labor within the Port Area, and a fair and reasonable percentage of administrative expense attributable to the services described in this subsection.

Article XIV.

Admission To Membership

No firm, person, association or corporation shall become a member of this corporation, unless and until it shall have

been approved for such membership by a vote of not less than a majority of the Board of Directors and unless the applicants shall be qualified for membership in accordance with the provisions of the Articles of Incorporation of this corporation and of these By-Laws.

Article XV.

Resignation

Any member may resign by submitting [42] its written resignation at any meeting of the Board of Directors or of the members, or by mailing or telegraphing its resignation to the corporation; and thereupon such resignation, without the necessity of any acceptance, shall become effective forthwith unless otherwise specified therein, provided, however, that no such resignation shall become effective until full payment of all arrears for dues and assessments to which such member has become liable. In the event that any member shall resign from membership in this corporation or shall be expelled from membership therein, all interest of such member in this corporation or in any of its property shall forthwith cease and terminate, provided, however, that no such resignation or expulsion and no suspension from membership in this corporation shall terminate or affect any liability of such member which may have theretofore accrued nor affect any obligation of such member under or pursuant to the terms of any labor contract or agreement theretofore made or entered into on its behalf by this corporation. The Board of Directors shall likewise have power to impose any penalties or other conditions to the re-admission of any such former member to membership in this corporation, or [43] to the termination of any suspension of any member.

Exhibit 3

ARTICLE XVI.

Final Distribution of Assets

Upon the dissolution of this corporation, after paying or adequately providing for the debts and obligations of the corporation, the remaining assets, if any, shall be divided among the members, as follows: All sums remaining in the funds derived respectively from cargo dues, shipping dues and area payroll assessments shall be distributed to each member contributing thereto in the proportion which its contributions to the respective funds during the preceding calendar year shall bear to the total amounts paid by all members contributing thereto in such year, and all other assets shall be distributed to each member in proportion to the total amount of dues and assessments assessed upon and paid by such member to the corporation during the preceding calendar year shall bear to the total amount of such dues and assessments assessed upon and paid by all members during the same year.

ARTICLE XVII.

Amendments

These By-Laws may be amended at any regular or special meeting of the [44] members in the notice of which the substance of the proposed amendment has been stated, by the vote of members holding two-thirds of the voting power of the entire membership.

Exhibit 4

PACIFIC COAST LONGSHORE AGREEMENT

June 16, 1961–July 1, 1966

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

And

PACIFIC MARITIME ASSOCIATION

* * *

[1] PACIFIC COAST LONGSHORE AGREEMENT

THIS AGREEMENT, dated June 16, 1961 and amended June 22, 1962, is by and between Pacific Maritime Association (hereinafter called "the Association"), on behalf of its members (hereinafter designated as "the Employers" or the "individual employer"), and the International Longshoremen's and Warehousemen's Union (hereinafted designated as "the Union"), on behalf of itself and each and all of its longshore locals in California, Oregon and Washington (hereinafter designated as "longshore locals") and all employees performing work under the scope, terms and conditions of this Agreement.

The parties hereto are the International of the International Longshoremen's and Warehousemen's Union and the coastwide Pacific Maritime Association. All property rights in and to the Pacific Coast Longshore Agreement are entirely and exclusively vested in the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union respectively, and their respective members. In the case of the International Longshoremen's and Warehousemen's Union, a majority of the members of both the individual and combined locals covered by this Agreement shall be necessary to designate any successor

organization holding property rights and all benefits of this Agreement, and if an election is necessary to determine a majority of both individual and combined locals in order to establish the possessors of all rights and benefits under this [2] Agreement, such election shall be conducted under the auspices and the supervision of the Coast Arbitrator provided for in Section 17, provided that such designation or election is not in conflict with any paramount authority or lawful or statutory requirements.

SECTION 1

Scope of This Agreement and Assignment of Work to Longshoremen

1.1 All movement of cargo on vessels of any type or on docks or to and from railroad cars and barges at docks shall be covered by this Agreement and all labor involved therein is assigned to longshoremen with the exceptions and enlargements set forth in this Section 1.

1.11 This Agreement covers the movement of outbound cargo only from the time it enters a dock and comes under the control of any terminal, stevedore, agent or vessel operator covered by this Agreement and covers movement of inbound cargo only so long as it is at a dock and under the control of any vessel operator, agent, stevedore, or terminal covered by this Agreement.

1.2 Dock work provisions.

1.21 The Employers are not required to perform the following dock work, or any parts thereof:

(a) High piling cargo and breaking down high piles of cargo,

(b) Sorting of cargo,

[3] (c) Movement of cargo on the dock or to another dock,

(d) The removing of cargo from cargo boards,

(e) Building any loads of cargo on the dock,

(f) Multiple handling of cargo.

However, when an employer chooses to perform any such dock work, it is work covered by this Agreement and is assigned to longshoremen. Carriage of cargo between docks by barge or rail or by trucks on public roads is not longshore work.

1.22 Cargo received on pallet, lift, or cargo boards, or as unitized or packaged loads shall not be rehandled before moving to ships' tackle, unless so directed by the employer.

1.23 Any load of cargo discharged from a vessel may be dock stored just as it left the hatch.

1.24 Any standard maximum load of cargo, as defined in Section 14, discharged from a vessel may be rearranged if necessary in order to de doubled up or high piled. Such cargo shall not be considered high piled unless stored more than two loads high.

1.25 Cargo may be removed by the consignee or his agent, without additional handling by longshoremen except for breaking down high piles and any other work as the employer may choose to have done under 1.21.

1.26 If jurisdictional difficulties arise in connection with the performance of dock work, whatever jurisdictional agreements are reached shall not result in multiple handling.

[4] 1.27 Provisions relating to sorting or subsorting cargo to marks shall not prohibit a drayman from taking

or rearranging such already sorted cargo for the purpose of properly loading his truck.

1.28 Masonite, hardboard and similar commodities are not high piled if the commodity is dock stored for delivery to a truck in piles not to exceed approximately six (6) feet in height.

1.3 Any class of seamen in the employ of a vessel operator may do the work herein assigned to longshoremen that such seamen in their class now do, or may do, by practice arrived at by mutual consent of the parties or the Joint Coast Labor Relations Committee.

1.4 The Union may at any time, in general or limited terms, waive in writing the right of longshoremen to do any portion of the work herein assigned to longshoremen or so accept an interpretation of such assignment, and to the extent and for the time that such waiver or interpretation is accepted by the Association in writing the employer may assign or permit assignment of excepted work to any other class of workers consistent with such waiver or interpretation. Among the waivers and interpretations that have been made and accepted are:

1.41 The Employers have the right to have trucks come under the hook to move heavy lifts, dunnage, lining material, long steel, booms, and ship-repair parts directly from truck to ship and/or ship to truck.

[5] 1.42 Longshoremen will load or discharge trucks operating in direct transfer to or from the ship and otherwise will work on trucks when directed to do so by the employer and no objection thereto is raised by the truck driver or his union.

1.43 Teamsters may unload their trucks, by unit lifts or piece by piece, to the area designated by the employer at

which point the trucking or drayage company or shipper releases control of the cargo.

1.44 Teamsters may load their trucks piece by piece from cargo boards or with unit lifts and build loads and otherwise handle cargo on their trucks or tailgates and on loading platforms and aprons.

1.45 The Employers are free to handle cargo at industrial docks in accordance with industrial dock practices used in the past.

1.46 Where a nonmember of the Association has control over the cargo at its premises or on its vessel, such nonmember's regular employees may perform work assigned to longshoremen herein while such cargo is out of the control of any member.

1.5 All machinery, equipment and other tools now or hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement, provided that exceptions thereto—as to individual nonlongshoremen or classes of workers who are not longshoremen and as to tools or classes of tools—may be continued and any exceptions may [6] be set up, modified or eliminated by joint agreement of the Association and the Union.

1.51 The individual employer shall not be demed to be in violation of the terms of the Agreement assigning work to longshoremen if he assigns work to a nonlongshoreman on a basis of a good-faith contention that this is permitted under an exception provided for herein.

1.52 Should there be any dispute as to the existence or terms of any exception, or should there be no reasonable

way to perform the work without the use of nonlongshoremen, work shall continue as directed by the employer while the dispute is resolved hereunder.

1.53 Any such dispute shall be immediately placed before the Joint Coast Labor Relations Committee by the party attacking any claimed exception or proposing any change in an exception or any new exception. The Joint Coast Labor Relations Committee decision shall be promptly issued and shall be final unless and until changed by the parties or that Committee. The Committee may act on the grounds set forth in 1.54 or on any other grounds. Both parties agree that its position on such a dispute shall in no case be supported by, or give rise to threat, restraint or coercion.

1.54 Any such dispute that is not so resolved by the Committee within seven (7) days after being placed before it, may be placed before the Coast Arbitrator on motion of either party. The Arbitrator shall decide whether an exception should be upheld [7] and may do so on the following grounds only:

(a) Nonlongshoremen were assigned the skilled or unskilled labor in dispute under practices existing as of January-August 10, 1959, arrived at by mutual consent and as thereafter modified or defined by the parties or the Joint Coast Labor Relations Committee; or

(b) The individual nonlongshoreman involved has been dependent on longshore work of the nature involved in the dispute so that the equities in favor of his continuing to make his livelihood in the performance of longshore work outweigh the equities in favor of having this work done by longshoremen; or

(c) There are available no longshoremen or too few longshoremen fully skilled in the operation of the tool in the port involved and there are available in the port (or in the larger area in which skilled longshoremen are not available) nonlongshoremen having high skill in the operation of the tool; or

(d) There is a shortage of longshoremen in the port or area; or

(e) Tools are not available on a bare boat basis and reasonable bona fide efforts to obtain them have been made and there is no reasonable substitute tool available.

1.6 This Agreement shall apply to cleaning cargo holds, loading ship's stores, handling lines, marking lumber, hauling ship, lashing, etc. Existing practices under which other workers perform such work [8] may be continued at the option of the Association.

1.7 Definitions.

1.71 The term "longshoreman" as used herein shall mean any man working under this Agreement.

1.72 The term "dock" as used herein shall mean any moorage—anchorage, pier, wharf, berth, terminal, waterfront structure, dolphin, dock, etc.—at which cargo is loaded to or discharged from ocean going vessels or received or delivered by an employer covered by this Agreement. The term "dock" does not include any facility at which vessels do not moor.

1.8 An employer in a port covered by this Agreement who joins the Association subsequent to the execution hereof and who is not a party to any conflicting longshore agreement becomes subject to this Agreement.

Exhibit 4

1.9 When work that is within the scope of this Agreement is assigned pursuant hereto to nonlongshoremen, the terms and provisions of this Agreement need not apply to such work.

* * *

[14] SECTION 3

GUARANTEES

3.1 Eight-hour guarantee.

3.11 Applicability and method of payment.

3.111 Fully registered and limited register men who are ordered to a job and who report to work and are turned to shall receive a guarantee of eight (8) hours' work or eight (8) hours' pay, except on the third shift where a guarantee of five (5) hours of work or five (5) hours' pay is applicable.

3.112 On the day shift, the eight-hour guarantee of work or pay shall be provided between the hours of 8:00 a.m. and 6:00 p.m.

3.113 On the second shift, the eight-hour guarantee of work or pay shall be provided within a spread of nine (9) hours from the normal starting time, or in the San Francisco Bay Area from the beginning of a late subsequent start permitted under the present provisions in the San Francisco working rules. The spread is enlarged by one (1) hour for a late initial start.

3.114 In the event eight (8) hours of work cannot be provided and dead time results, such time on the day shift from Monday through Friday shall [15] be paid for at the straight time rate of pay. Dead time shall not be charged against the six-hour day. On the second shift, week ends and holidays, dead time shall be paid for at the overtime

rate of pay of 1.5 times the straight time rate. No penalty cargo rates shall be paid for dead time hours.

3.115 A man shall have only one eight-hour guarantee in any one day (See 3.28).

3.12 Exceptions to eight-hour guarantee.

3.121 The eight hour guarantee shall not apply in the following circumstances:

3.1211 When men are neither turned to nor ordered to stand by (See 3.22);

3.1212 When men are turned to or ordered to stand by and work cannot commence, continue or resume because of bad weather (such determination to be made by the employer) and the men are not ordered back after a midshift meal (See 3.23);

3.1213 When extra longshoremen from the skilled classifications are ordered and turned to on an operation of short duration and are not shifted thereafter to comparable work on other docks or ships and are not ordered back after a midshift meal (See 3.24);

3.1214 When men employed at Selby, California, are not shifted to other operations to fill out the eight-hour guarantee (See 3.27); and

3.1215 As provided in 3.4.

3.122 Where men have been ordered and fail to report to work at all or on time, thus delaying [16] the start of an operation, the time lost thereby until replacements have been provided or until the man or gang has been turned to shall be deducted from the eight-hour guarantee.

3.123 When gangs are traveled and, as a result, their starting time is later than 9:00 a.m. so that it is impossible to fill out the eight-hour guarantee between 8:00 a.m. and

6:00 p.m., the guarantee shall be pay or work from actual starting time until 6:00 p.m., except for the meal hour. The same principle shall apply to a night shift start.

3.124 When hours are lost as a result of stop-work meetings, or mutual agreement of the ILWU and PMA, such hours shall be deducted from the eight-hour guarantee.

3.125 In those ports where a 4:00 p.m. or 5:00 p.m. stop is provided by rule for specific days, the guarantee on such days shall be from the starting time, which for payroll purposes can be no later than 9:00 a.m., to such 4:00 p.m. or 5:00 p.m. stop.

3.126 When men are employed at Selby, California, the employer may shift the men to other operations to fill out an eight-hour guarantee, otherwise the guarantee is only four (4) hours. If men are not shifted to other work but are ordered back after a midshift meal, a second four-hour minimum shall apply.

3.13 Accompanying the obligation placed upon the Employers to furnish eight (8) hours of work each shift is the obligation on the part of the men to shift from one job to another for the purpose of [17] working a full shift when such move is ordered by the Employers. Subject to the provisions hereunder the Employers have the right to shift men and gangs in order to fill out the work guarantee. Men and gangs shall shift as ordered.

3.131 To fill out his eight-hour work guarantee, a skill rated longshoreman may be shifted only to skill rated work suitable to his qualifications.

3.132 Employers may shift men in ship gangs to any other work including all dock and car work in order to fill out the work guarantee.

3.133 Dockmen shall not be shifted to work aboard ships to get the eight-hour guarantee but may be shifted to any work on docks, cars or barges.

Exhibit 4

3.1331 Dockmen will be released when there is no further work for them or on normal "knock off" day (as provided by local working rules) on a dock, whichever comes first.

3.1332 Dock gangs and/or men assigned to work against a ship will be released at the end of the shift when their work for that vessel is completed. After the ship sails, the employer may retain dockmen (against that ship) as required to handle that ship's cargo on the dock even though the ship gangs have been released.

3.1333 Dock gangs and/or men assigned to work on a dock will do any dock work. These men can be moved anywhere at any time on the dock and can be shifted temporarily to work against a ship or to another dock in order to fill out or fulfill their guarantee and then shifted back to their usual dock [18] work. These men can also be shifted to work against a ship when the dock units assigned to a ship are not complete.

3.1334 Dock units and/or men who are assigned to work against a ship can be moved anywhere to work against the ship and may be shifted or transferred as follows:

3.13341 To any other dock work when there is no work against the ship at the beginning of the shift or during the course of the shift, to be returned to work against the ship when such work becomes available.

3.13342 To any other dock work to fill out the eight-hour guarantee.

3.13343 To another ship for a late start; or to another ship which is going to shift or sail; or in other situations to avoid other eight-hour guarantees.

3.13344 When the ship gang is working and the dockmen are not required. This clause will be interpreted to

mean that men will not be transferred away for unreasonably short periods.

3.13345 If the ship gang is shifted to another vessel or to do dock work.

3.13346 If the ship gang is working a high line operation or from a barge or other cargo handling that does not require any or all of the dockmen.

3.13347 When dockmen are shifted from the first ship and further work will take place on that ship, the men may be transferred to other [19] work in accordance with 3.13341 to 3.13346 inclusive above, and unless peeled off shall be ordered back to the first ship either during the same shift or the next day. If there is no further work against the first ship, such men shall be released at the end of the shift.

3.13348 Dock units or dockmen do not have gear priority. Dock units or dockmen may be peeled off in the same manner as ship gangs and the remaining dock units or men may be used against all gears.

3.134 The employer shall order swingmen (ship or dockmen) when such men are necessary. These swingmen shall be ordered for the shift when it is reasonably anticipated that they will be used in the hold and may be used for any dock work and/or for hold work in any hatch.

3.135 Employers may shift men from shovel and freezer work to any other work including all dock and car work in order to fill out a shift. When so shifted, the penalty cargo rate shall not prevail. The employer may not shift men dispatched for general cargo to shovel or freezer work.

3.136 The employer shall have the right to peel off gangs at any time during a shift or at the end of a shift. The remaining gangs can work at all gears.

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3.1361. The Employers have the right to order back after any shift only such gangs as are needed to finish the remaining work. Such gang or gangs ordered back must be the gang or gangs which [20] the employer believes in good faith have the most work to do at their gear. They may be required to finish the work at the gear of the released gangs. Under such circumstances the gear priority of the gangs released is suspended. Any gang peeled off under this rule cannot be replaced at its gear by a new gang from the dispatching hall until the second subsequent comparable shift.

3.1362 Gangs ordered to work under conditions which such gangs contend violate gear priority rules shall work as directed and claim(s) for such violation shall be presented by the Union. If it is established that a gear priority violation did occur, then it will be automatic that the amount of time another gang worked in the hatch in which the gear priority violation was claimed will be paid the gang whose gear priority was violated on an hour for hour basis, unless the employer on whose ship the alleged gear priority violation occurred maintains that such incident happened for reasons beyond the employer's control. The employer may then take that position and process it through the grievance procedure to the Area Arbitrator for final decision.

3.137 The shifting of registered and limited registered men to fulfill the guarantee shall be carried out without bumping.

3.138 Any gear priority rule will not prevent the shifting of men and gangs for the purpose of fulfilling the eight-hour guarantee.

3.139 "Center line" and "imaginary bulkhead" and similar practices which result in arbitrary [21] division of work among gangs shall be eliminated.

Exhibit 4

3.14 Rules and examples applicable to shifting men or gangs:

3.141 Initial late start orders may be placed at the dispatching hall to work a ship and to shift to a second ship for a late start on the second ship. Men so ordered shall be dispatched for the second ship, with orders to work the first ship only as a fill-in.

3.142 Men or gangs may be ordered to shift from a job or a ship that they have completed to a late start on another job or ship. Such men or gangs will be released at the end of the shift on the second job and may be required to work no longer than the extended hours as provided in Section 2.

3.143 Men or gangs may be ordered to shift from a job or a ship where they have not completed their original assignment or permit a late start on another job or ship, or in order to fill out the eight-hour work guarantee, or in order to finish the second ship for shifting or sailing. These men or gangs will be ordered back to their original job during that shift or for the start of the next day's shift. If extended hours are required to permit the second ship to shift or sail, the men or gangs will work up to but not beyond the end of the extension provided in Section 2.

3.144 Men or gangs may be ordered to shift from a job or a ship which they have not completed but where they have run out of available work—e.g. a delay in arrival of cargo, a breakdown of [22] equipment, a ship that fails to arrive as scheduled, etc.—to another job or ship in order to complete the eight-hour guarantee, and they will be ordered to return to their original job to finish it.

3.145 Shifting of men or gangs under 3.13 or 3.14 may be accomplished without clearance through the dispatching hall.

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3.146 Gangs will have gear priority on only one ship during a shift and will be released to the dispatching hall at the end of any shift in which they have completed their work on the ship on which they had priority.

3.15 Possible adjustments in small ports:

3.151 The full provisions of the eight-hour guarantee shall prevail in all ports. In ports of six gangs or less adjustments may be made in leeway for late starts because no alternative work is available to fill out the eight-hour guarantee by mutual agreement at the local level provided there is approval by the Joint Coast Labor Relations Committee.

3.2 Four-hour minimum.

3.21 Longshoremen, other than fully registered or limited registered men, who are ordered to a job and are turned to shall received a minimum of four (4) hours' work or four (4) hours' pay.

3.22 Men who are ordered, report for work and are neither turned to nor ordered to stand by shall receive the four-hour minimum, except where inability to turn to is a result of insufficient men to start the operation. Present port rules defining the number of men to start operations shall apply.

[23] 3.221 When an operation cannot commence at the designated starting time because of failure of at least the minimum required and properly ordered number of men to appear, then pay shall be as follows:

3.2211 Units not filled to minimum complement as provided in local working rules shall receive no pay unless they receive and accept an order to stand by awaiting additional men as needed to complete the minimum complement of men. Such standby shall, if accepted, be paid for and limited to one hour.

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3.2212 Other units or men directly related to the operation who report for work as ordered shall be turned to. They may be released one hour later if the balance of the work does not commence or continue thereafter because of insufficient men being present. If they are so released they shall receive a four-hour minimum in addition to the time they may have worked prior to the commencement of the shift.

3.2213 Where possible, units of less than the minimum requirements of men shall be consolidated to provide proper complements and the men shall so combine or shift as provided by this Agreement.

3.222 When the required minimum number of men report and turn to as directed and work continues up to the midshift meal hour and there are men who as yet have not reported, then either the men or the employer can determine that work cannot [24] continue thereafter. When work ceases under these circumstances or if the employer determines that the operation is not satisfactory prior to the meal hour then the minimum pay for all related men or units shall be time worked or four (4) hours, whichever is the greater.

3.223 When the required minimum complement reports and the operation commences and cannot be continued because of refusal of men to continue working with less than the required number of men, then pay shall be as follows:

3.2231 Such men or units of men refusing to continue work shall be paid on the basis of time worked.

3.2232 Related men or units of men shall be shifted to other work, or shall be released with a four-hour minimum.

3.2233 Such a refusal to continue work shall not be considered a violation of this Agreement.

Exhibit 4

3.23 When men are turned to or ordered to stand by and work cannot commence or continue because of bad weather (such determination to be made by the employer), the four-hour minimum shall apply unless the men are ordered back after a midshift meal. Any dead time resulting from bad weather shall be paid under 3.114.

3.24 When an operation of short duration requires extra longshoremen from the skilled classifications and such men are ordered and turned to, they shall have a four-hour minimum, and can be transferred [25] to comparable work on the original dock or ship to fill out the four-hour minimum.

3.25 When a gang quits during the course of the eight (8) hours of work or quits by refusal to work the extensions for shifting or sailing and a replacement gang is ordered from the dispatching hall then the replacement gang shall have a four-hour minimum guarantee for that shift.

3.26 Any replacements ordered or accepted by the employer is to be paid for time worked, or the four-hour minimum, whichever is greater, on his initial shift.

3.27 When men are employed at Selby, California, they have a four-hour guarantee. If the employer shifts the men to other operations or orders them back after a midshift meal then the eight-hour guarantee shall apply.

3.28 A man who has received an eight-hour guarantee and has been dispatched from the hall to a new job shall receive an additional four-hour guarantee for the second job. Overtime is payable only after six (6) hours of straight time work on both jobs.

3.3 Three-hour guarantee.

3.31 When men are ordered back after supper they shall be paid a minimum of three (3) hours.

Exhibit 4

3.4 General provisions as to guarantees.

3.41 There shall be no guarantee for any man who is released for cause or who quits or who refuses to shift as provided under 3.13 or who loses [26] hours as a result of ILWU unilateral action or who is not turned to where inability to turn to is a result of insufficient men to start the operation or who is turned to and works less than his guaranteed time by reason of illness or injury. Such men shall be paid only for their actual working time.

3.42 When men are late in reporting at the designated shift starting time on an initial or subsequent start, if they are turned to, they shall then be turned to at and paid as of the next quarter-hour; that is, the quarter-hour, the half-hour, the three-quarter hour or the even hour, and time lost between the designated starting time and time turned to shall be deducted from the guarantee.

3.43 When men are not sent to eat before the beginning of the second hour of the two-hour meal period, pay for the work in the second hour shall be one-half hour if worked less than one-half of such hour and one full hour if worked one-half or more than one-half of such hour.

3.44 When men are knocked off work six (6) minutes or more after the even hour, they shall be paid to the next one-half hour and when knocked off thirty-six (36) minutes or more past the even hour, they shall be paid to the end of the hour.

3.45 The guarantees of this Section 3 do not apply to longshore baggagemen or linesmen or to gearmen called in on an emergency.

3.451 Guarantees applicable to longshore baggagemen, linesmen and gearmen called in on an emergency may be adopted or modified by unanimous [27] action of the Joint

Exhibit 4

Coast Labor Relations Committee and, subject to the control of such Committee so exercised, existing and future local rules or mutually agreed practices shall be applicable.

3.46 No rule is to be used as a subterfuge for firing gangs.

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[28] SECTION 6

WAGES

6.1 Wage Rates.

6.11 The rates of pay for longshore work shall be as set forth in the Wage Rate Schedule and shall be effective as set forth therein.

6.12 The straight time rate (which may be the basic straight time rate or that rate plus applicable straight time penalty cargo rate and/or skill differential) shall be paid for work in the basic, normal or regular workday and workweek consisting of the first six (6) hours worked between 8:00 a.m. and 5:00 p.m., Monday through Friday. For work outside of such basic, normal or regular workday or workweek extra compensation in the form of premium rates shall be provided in accordance with the provisions of 6.2.

6.2 Straight and overtime rates shall be paid according to the following schedule:

6.21 Straight time rate.

6.211 First six (6) hours worked between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday.

6.22 Overtime rate of 1.5 times the straight time rate.

[29] 6.221 All work in excess of six (6) hours between 8:00 a.m. and 5:00 p.m.

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6.222 All work between 5:00 p.m. and 8:00 a.m. on weekdays and all work on Saturdays, Sundays and Agreement holidays, except such work as requires a higher premium rate as provided below.

6.223 When working after 12:00 noon without release for meal—except on Saturdays, Sundays and Agreement holidays—and work continuing thereafter without an opportunity to eat.

6.23 Time and one-half the 1.5 overtime rate.

6.231 When working into the second hour of the meal period on the second shift without release for meal and work continuing thereafter without an opportunity to eat.

6.232 When working after 12:00 noon without release for meal—on Saturdays, Sundays and Agreement holidays —and work continuing thereafter without an opportunity to eat.

6.233 Work in excess of five (5) consecutive hours without an opportunity to eat when the rate then prevailing is the overtime rate.

6.234 All work in excess of eleven (11) hours in any one shift.

6.24 Overtime premium rate of 1.8 times the straight time rate.

6.241 The first five (5) hours of work during overtime hours when the man's work begins at 2:30 a.m. or 3:00 a.m.

6.25 Time and one-half the 1.8 overtime premium rate.

[30] 6.251 Work in excess of five (5) hours when the man's work begins at 2:30 a.m. or 3:00 a.m.

6.3 Skill differentials.

Exhibit 4

6.31 In addition to the basic wages for longshore work, additional wages to be called skill differentials shall be paid for the types of work specified below.

6.32 During overtime hours, the skill differential shall be one and one-half times the straight time differential.

6.33 Skill Differentials By Areas

Skill	So. Cal.	No. Cal.	Ore.	Wash.
Blade Trucker—Aboard ship	—	—	—	.25
Blade Trucker—On dock	—	—	—	.15
Boom Man	—	—	.15	.15
Burton Man	.15	—	.15	.15
Bulldozer Operator [3]	.30	.30	.30	.30
Combination Lift Truck—Jitney Driver	.15	.15	.15	.15
Crane Chaser	—	—	.15	—
Crane Driver	.40	.40	.40	.40
Donkey Driver	—	—	.15	.15
Dragline Driver	.15	.15	.15	.15
Gang Boss	.40 [1]	.20	.20	—
			.25 [2]	
[31] Guy Man	.15	—	—	—
Hatch Boss Tender [4]	—	—	—	.25
Hatch Tender	.15	.15	.15	.15
Lift Truck Operator	.15	.15	.15	.15
Payloader Operator [3]	.15	.15	.15	.15
Ross Carrier Driver	.15	.15	.15	.15
Sack Turner	—	—	.15	.15
Side Runner	—	—	.15	.15
Stowing Machine Driver	—	—	.15	.15
Winch Driver	.15	.15	.15	.15

6.34 The rate of pay for Jitney Drivers shall be the basic longshore rate. When a Jitney Driver is dispatched

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[1] Applies to Pt. Hueneme only.

[2] Coos Bay, Newport and Bandon .25; other Oregon ports .20.

[3] Two men shall be employed for each machine in continuous

to drive Jitney, he may be assigned to other work to fill out his minimum guarantee. Combination Lift Truck-Jitney Drivers may be required to work both as Jitney and Lift Truck Drivers. When a Combination man, dispatched as such, is required to drive Jitney, he shall be paid the skill differential, and shall not be replaced during the job by a man working at less than the combination rate.

6.35 The parties or the Joint Coast Labor Relations Committee shall establish coastwise skill rates for operating cranes and other tools and, where appropriate, [32] for operating machinery not presently in use.[1]

6.4 Penalty cargo rates.

6.41 In addition to the basic wages for longshore work, additional wages to be called penalties shall be paid for the types of cargoes, conditions of cargoes, or working conditions specified in the Wage Rate Schedule.

6.42 The parties will study the entire Penalty Cargo List with the intent of revising it to eliminate commodities where packaging or mode of handling has changed so as to remove the obnoxious features, and to add new commodities where there are obnoxious features justifying a penalty and to provide the penalties applicable to crane drivers. Any disagreement reached shall be resolved by the Coast Arbitrator.

6.43 Except where otherwise specified, the penalty cargo rates shall apply to all members of the longshore gang and dockmen working the penalty cargo.

6.44 Where two penalty rates might apply, the higher penalty rate shall apply and in no case shall more than one penalty rate be paid.

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[4] Applies to Tacoma and Anacortes only.

[1] Supplement IV will attach hereto as adopted by the Joint Coast Labor Relations Committee.

Exhibit 4

6.45 During overtime hours, including those hours worked in shifts beginning at 2:30 or 3:00 a.m., the penalty cargo rate shall be one and one-half times the straight time penalty cargo rate.

[33] 6.46 The straight time penalty rate for working explosives shall at all times equal the basic straight time rate.

6.47 Where skill differentials and penalties both apply, the allowance for both the skill differential and the penalty shall be added to the basic rate and shall be augmented during overtime hours as provided in this Section 6.

6.5 Subsistence.

Subsistence rates when payable shall be five dollars ($5.00) per night for lodging and two dollars ($2.00) per meal.

6.6 Personal effects.

Men shall be reimbursed for damage (other than usual wear and tear) to personal effects which are damaged on the job, provided satisfactory evidence is presented to the Joint Port Labor Relations Committee. The amount of the reimbursement shall be decided by the Committee, which shall adhere to the following rules:

6.61 Personal effects are items which a man needs to take on the job to perform his work, and there must be proven need for the item on the job.

6.62 Any damage must be a direct result of performing work and must be reported to company supervision on the job when it occurs.

6.63 The damaged item must be exhibited to the Committee for determination of the depreciation and extent of damage.

6.64 The claim must be accompanied by prima [34] facie evidence that the item was damaged on the job, and negligence and carelessness are factors to be given consideration.

6.65 If reimbursement is in order, the item will either be repaired or replaced in kind or reimbursed at its depreciated value.

6.66 Any second approved claim, by an individual, for broken glasses, may be reimbursed by replacement with safety-type glasses.

6.67 Claims for lost or stolen items are not valid.

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[42] SECTION 8

Hiring, Dispatching, Registration and Preference

8.1 Dispatching halls.

8.11 The hiring and dispatching of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association in accordance with the provisions of Section 17. There shall be one central dispatching hall in each of the ports with such branch halls as shall be mutually agreed upon. All expense of the dispatching halls shall be borne one-half by the local union and one-half by the Employers.

8.12 Any longshoreman who is not a member of the Union shall be permitted to use the dispatching [43] hall only if he pays his pro rata share of the expenses related to the dispatching hall, the Labor Relations Committee, etc. The amount of these payments and the manner of paying them shall be fixed by the Joint Port Labor Relations Committees.

Exhibit 4

8.13 Any non-Association employer shall be permitted to use the dispatching hall only if he pays to the Association for the support of the hall the equivalent of the dues and assessments paid by the Association's members. Such non-member employers shall have no preference in the allocation of men, and shall be allocated men on the same basis as Association members.

8.14 Longshoremen not on the registered list shall not be dispatched from the dispatching hall or employed by any employer while there is any man on the registered list qualified, ready and willing to do the work.

8.2 Dispatching hall personnel.

8.21 The personnel for each dispatching hall, with the exception of Dispatchers, shall be determined and appointed by the Joint Labor Relations Committee of the port. Dispatchers shall be selected by the Union through elections in which all candidates shall qualify according to standards presecribed and measured by the Joint Labor Relations Committee of the port. If it fails to agree on the appropriate standards or on whether a candidate is qualified under the standards, the dispute shall be decided in accord with provisions of Section 17.

[44] 8.22 The term of office of any Dispatcher shall be at least one year.

8.23 All personnel of the dispatching hall, including Dispatchers, shall be governed by rules and regulations of the Joint Port Labor Relations Committee, and shall be removable for cause by the Joint Port Labor Relations Committee.

8.24 The Association shall be permitted to maintain a representative in the dispatching hall. The Joint Port Labor Relations Committee shall permit any authorized representative of the Association or the Union to inspect dispatching hall records.

Exhibit 4

8.3 Registration.

8.31 The Joint Port Labor Relations Committee in any port, subject to the ultimate control of the Joint Coast Labor Relations Committee, shall exercise control over registered lists in that port, including the power to make additions to or subtractions from the registered lists as may be necessary. In each port there shall be maintained a list of longshoremen showing their registration status under this Agreement. When objecting to the registration of any man, members of the Joint Port Labor Relations Committee shall be required to give reason therefor.

8.32 Any longshoreman registered by a Joint Port Labor Relations Committee in accordance with this Agreement shall thereby acquire joint coastwide registration under the Pacific Coast Longshore Agreement and the Master Agreement for Clerks, [45] Checkers, and Related Classifications. The rights and obligations of coastwide registration in regard to transfers between ports, visiting, and leaves of absence are set forth in Supplement I to this Agreement. The rights and obligations of coastwide registration in regard to transfer of registered longshoremen to registered clerk status and vice versa are set forth in Supplement II to this Agreement.

8.33 Either party may demand additions to or subtractions from the registered lists as may be necessary to meet the needs of the industry.

8.34 Each registered longshoreman has the obligation to request a leave of absence if he intends to absent himself from work for a period of thirty (30) days or longer and in other circumstances as may be covered by port rules under Supplement I. A registered longshoreman who fails to work for thirty (30) days, except when on approved leave, and whose facts and reasons for such absence are

Exhibit 4

not acceptable to the Joint Port Labor Relations Committee, may be de-registered.

8.4 Preference of employment.

8.41 First preference of employment and dispatch shall be given to fully registered longshoremen who are available for employment covered by Section 1 of this Agreement in accordance with the rules and regulations adopted by the Joint Port Labor Relations Committee. A similar second preference shall be so given to limited registered men. The Joint Coast Labor Relations Committee shall be authorized to effectuate such preferences in such [46] manner and for such times and places as it determines in its discretion.

8.42 Dispatching of men and gangs shall be under the principle of low-man, low-gang, first-to-be-dispatched, except where local dispatching rules provide otherwise for dispatching of special skilled men and gangs.

8.43 There shall be no favoritism or discrimination in the hiring or dispatching or employment of any longshoreman qualified and eligible under the Agreement.

8.44 Any longshoreman or dispatching hall employee found guilty by the Joint Port Labor Relations Committee of favoritism or discrimination or bribery shall immediately be discharged and dropped from the registered list.

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[47] SECTION 10

ORGANIZATION OF GANGS, GANG SIZES AND MANNING, AND METHODS OF DISPATCHING

10.1 The Joint Port Labor Relations Committee shall determine the methods of dispatching for the port. Gangs and men shall be dispatched only as ordered by the em-

ployer. The Employers shall have the right to have dispatched to them, when available, the gangs in their opinion best qualified to do their work. Subject to the provisions of this Agreement, gangs and men not assigned to gangs shall be so dispatched as to equalize their work opportunities as nearly as practicable, having regard to their qualifications for the work they are required to do. The [48] Employers shall be free to select their men within those eligible under the policies jointly determined and the men likewise shall be free to select their jobs.

10.11 The employer shall have until 2:00 p.m. to file orders or cancel orders for gangs for the second and third shifts.

10.2 The organized or make-up minimum basic ship gang for general break bulk cargo (hereinafter called the "basic gang") shall consist of men as follows:

A gang boss (in ports where such are used)
A winch driver (two on single winches)
A hatch tender
Two (2) sling or front men
Four (4) holdmen (including any side runners used).

10.21 Except as hereinafter provided:

10.211 On loading operations: when the loads are being landed in the vessel at their place of rest, the basic gang can be used; when the loads are being stowed by mechanical equipment after landing, the basic gang shall be supplemented by the necessary driver(s).

10.212 On discharge operations, this basic gang can be used when the loads are being moved to the point of removal from the vessel by mechanical equipment plus

driver(s) or are ready for slinging without additional work except the placement of slings or similar devices.

10.22 When the cargo handling operation to [49] be performed requires only a basic gang, that gang may be used to rig, uncover and cover hatches without additional men.

10.23 When cargo is to be hand-handled, then two swingmen shall be used with the basic gang for all discharge operations, and four swingmen shall be used for all loading operations. Exception: When space and safety are the factors that dictate that only one load can be handled at a time, prior to the handling of the second load, then the basic gang can perform such handling provided it is to last for one hour or more.

10.24 Such swingmen as are called for herein may be used for any dock work and/or for hold work in any hatch and may be shifted as provided in 3.132 and the second winch driver may be shifted as provided in 3.131. Swingmen, skilled or unskilled, and the second winch driver, shall not be added to the basic gang complements in order to have ship's time guaranteed. They shall have the eight-hour guarantee and the right to call-backs without favoritism. They may be released at the end of any shift when they are not needed to start the next shift.

10.25 Longshore work such as rigging, laying dunnage, etc. in connection with loading and discharging is to be performed as ordered.

10.26 The employer shall be permitted to bring machinery and machine drivers into the hold and to swing out an equivalent number of holdmen, provided four basic holdmen are retained at all times.

10.27 The minimums set forth can be supplemented [50] in any numbers as ordered by the employer, while needed, without precedent.

Exhibit 4

10.28 If loads above contractual limits are to be moved manually, and additional men or machines are required to guarantee against onerous individual workload, and to maintain safety standards, they will be provided.

10.3 Manning for existing operations shall continue with the employer having the right to ask for review of such manning through the contract machinery in the following situations:

(a) Where existing manning for other general cargo operations, including packaged lumber and mixed operations of break bulk and unitized cargo (other than hand-handled operations), exceed the basic gang; provided, however, that such review shall not seek to reduce the manning below said basic gang, and shall be based on a determination of necessary men as defined in 15.2.

(b) For remaining existing operations, such review shall be based on a determination of necessary men as defined in 15.2 and shall not be limited by the basic gang structure.

10.31 In existing operations, where changed methods having already been introduced which eliminate hand-handling of cargo on a piece by piece basis; or which eliminate hand-handling of units (as in cases of straight runs of unitized cargo, mechanically landed, lifted and stowed and vice versa); or which eliminate the need for holdmen by removal [51] of devices (as in the case of chutes in scrap operation), the procedure of 10.3(b) shall apply.

10.4 When new methods of operation are introduced, the Employers shall discuss the proposed manning with the Union. If agreement cannot be reached at the coast level, the Employers shall have the right to put their manning in effect, subject to final resolution through the Agreement grievance machinery.

Exhibit 4

10.5 The use of dock gang units shall continue with flexibility in their usage. A dock gang need not be released as a unit.

10.6 If, during a shift, a change is made from a discharge to a loading operation, and the change requires additional men under the provisions of this Section 10, if the employer is unable to swing in men from ship or dock from his own employees, the holdmen will work without additional men for a maximum of fifteen (15) loads but not more than one hour.

10.7 The safeguards of 15.1 shall apply to gang size and manning.

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[55] SECTION 14

Sling Load Limits

14.1 Where conditions, number of longshoremen on the dock and in the ship, and the method of operation are the same as in 1937, loads for commodities covered herein built by a longshoreman shall be of such size as the employer shall direct within the maximum limits herein specified, and no employer shall direct and longshoremen shall not be required to build loads covered by this 14.1 in excess of the following standard maximum sling loads:

Commodity	Sling Load
(1)–Canned Goods	
24–2½ talls, 6–12's tall and 48–1 talls (including salmon)	35 cases
When loads are built of 3 tiers of 12	36 cases
24–1 talls	60 cases
24–2's talls	50 cases
6–10's talls	40 cases
Miscellaneous cans and jars— Maximum 2100 lbs.	

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(2)–Dried Fruits and Raisins

(Gross Weight)

22 to 31 lbs.	72 cases
32 to 39 lbs.	60 cases
40 to 50 lbs.	40 cases
24–2 lbs.	35 cases
48–16 oz.	40 cases

(3)–Fresh Fruits–Standard Boxes

Oranges–Standard	27 boxes
[56] Commodity	Sling Load
Oranges–Maximum	28 boxes
Apples and Pears	40 boxes

(4)–Miscellaneous Products

Case Oil–2–5 gal. cans (hand hauled to or from ship's tackle)	18 cases
Power hauled to or from ship's tackle	24 cases
Cocoanut	12 cases
Tea–Standard	12 cases
Tea–Small	16 cases
Copper slabs (large)	5 slabs
Copper slabs (small)	6 slabs
Copper (bars)	9 bars
Copper (Ingots), Approximately 43 lbs per Ingot	48 ingots
Cotton, under standard conditions	3 bales
Rubber (1 tier on sling), maximum	10 bales
Gunnies, large	2 bales
Gunnies, medium	3 bales
Gunnies, small	4 bales
Rags, large (above 700 lbs.)	2 bales
Rags, medium (500 to 700 lbs.)	3 bales
Rags, small (below 500 lbs.)	4 bales

Exhibit 4

Sisal, large	3 bales
Hemp, ordinary	5 bales
Jute, 400 lb. bales	5 bales
Pulp, bales weighing 350 lbs. or more	6 bales
Pulp, bales weighing 349 lbs. or less	8 bales
Steel drums, containing Asphalt, Oil, etc., weighing 500 lbs. or less	4 drums
(When Using Chine Hooks)	
[57] Commodity	Sling Load
Steel drums, containing Asphalt, Oil, etc., weighing 500 lbs. or less on board (capacity of board–1 tier), maximum of	5 drums
Barrels, wood, heavy, containing wine, lard, etc., maximum of	4 bbls.
(when Using Chine Hooks)	
Barrels, wood, heavy, containing wine, lard, etc., (capacity of board-1 tier, on board maximum of	4 bbls.
Barrels, wood, containing dry milk, sugar, etc.	6 bbls.
Newsprint, rolls	2 rolls
Newsprint, rolls (when weight is 1800 lbs. or over)	1 roll
(5)–Sacks	
Flour–140 lbs.	15 sacks
Flour–100 lbs.	20 sacks
Flour– 50 lbs.	40 sacks
Flour– 50 lbs. (in balloon sling)	50 sacks
Cement	22 sacks
Wheat	15 sacks
Barley	15 sacks
Coffee–Power haul from and to ship's tackle	12 sacks
Coffee–Hand pulled from and to ship's tackle (bags weighing approximately 136 lbs.)	9 sacks

Exhibit 4

[58] Commodity	Sling Load
Coffee–Hand pulled from and to ship's tackle (bags weighing 137 lbs. and over)	8 sacks
Other sacks–maximum	2100 lbs.
(6)–When flat trucks are pulled by hand between ship's tackle and place of rest on dock load not to exceed	1400 lbs.
(7)–Number of loaded trailers (4 wheeler)–to be hauled by jitney as follows:	
Within the limits of the ordinary berthing space of the vessel	2 trailers
Long hauls to bulk head warehouses or to adjoining docks or berths	3 trailers
Extra long haul to separate docks or across streets–4 trailers providing that four (4) trailers shall be used only where it is now the port practice.	
(8)–When cargo is transported to or from the point of stowage by power equipment, the following loads shall apply:	
48–1 talls	40
24–1 talls	60
24–2's talls	48
24–2½'s talls	40
6–10's talls	50
6–12's talls	50

[59] 14.11 The package described in the foregoing schedule of maximum load limits on loads covered by 14.1 are for the standard sizes by weight and measurement of 1937. If any commodities named are of a size as to weight and measurement different from that which is specified, the maximum load limit will be changed accordingly for any such commodity, by mutual agreement.

Exhibit 4

14.12 If cargo is being pre-palletized on the dock, the load limits herein specified do not govern.

14.13 It is agreed that the Employers will not use maximum-sized loads or minimal numbers of men as a subterfuge to establish unreasonable speed-ups; nor will the Union or its longshore local(s) resort to subterfuge to curtail production.

14.2 In the case of all commodities other than those listed in 14.1 or on operations not subject to the limitations of 14.1, where operations have changed or where new commodities or operations have developed, loads shall be built and handled as directed by the employer, within safe and practical limits and without speed up of the individual. Any dispute arising with regard to such an operation shall be settled through the grievance machinery with work continuing as ordered by the employer.

14.21 An increase in the number of longshoremen manhandling cargo or the use of machinery to move or stow cargo on the dock or on the ship shall be considered a change in operations that permits [60] the handling of loads larger than those specified in 14.1.

14.3 Loads shall be skimmed only as necessary to an operation and as ordered by the employer.

14.4 The Union shall have the right, without limitation, to raise a claim that an operation imposes an onerous workload on the individual worker and to carry such an issue through the grievance machinery as provided in accordance with Sections 11 and 17 of this Agreement.

SECTION 15

Efficient Operations

15.1 There shall be no interference by the Union with the Employers' right to operate efficiently and to change

methods of work and to utilize laborsaving devices and to direct the work through employer representatives while explicitly observing the provisions and conditions of the Agreement protecting the safety and welfare of the employees. "Speed-up" refers to an onerous workload on the individual worker; it shall not be construed to refer to increased production resulting from more efficient utilization and organization of the workforce, introduction of laborsaving devices, or removal of work restrictions.

15.11 In order to avoid disputes, the employer shall make every effort to discuss with the Union in advance the introduction of any major change in operations.

[61] 15.2 The employer shall not be required to hire unnecessary men. The number of men necessary shall be the number required to perform an operation in accordance with the provisions of 15.1, giving account to the contractual provisions for relief and the fact that during many operations all men will not be working at all times due to the cycle of the operation.

15.3 The Employers shall have the right to propose changes in working and dispatching rules that they claim are in conflict with the intent of provisions incorporated in this Agreement. The Joint Coast Labor Relations Committee may refer proposed changes that are of only local significance to the local level for negotiation. Any such change agreed to at the local level must be approved at the coast level before being put into operation. Any proposal referred to the local level and not resolved within thirty (30) days thereafter shall automatically return to the Joint Coast Labor Relations Committee.

15.4 Any disputes concerning the interpretation or application of provisions of this Agreement relating to the subject matter of this Section 15 may be submitted directly to the Joint Coast Labor Relations Committee.

Exhibit 4

SECTION 16

Safety

16.1 Recognizing that prevention of accidents is [62] mutually beneficial, the responsibility of the parties in respect thereto shall be as follows:

16.11 The Union and the Employers will abide by the rules set forth in the existing Pacific Coast Marine Safety Code which shall be applicable in all ports covered by the Agreement.

16.12 The Employers will provide safe gear and safe working conditions and comply with all safety rules.

16.13 Each individual employer will continue to furnish protective clothing or devices as he did on October 18, 1960, even though not specifically required by the Pacific Coast Marine Safety Code. At the local level the parties will from time to time review the questions of protective clothing and devices and arrive at and maintain an orderly procedure for the issuance, safeguarding, and return of the items furnished by the employers.

16.14 The Employers will maintain, direct and administer an adequate accident prevention program.

16.15 The Union will cooperate in this program and develop and maintain procedures to influence all longshoremen to cooperate in every way that will help prevent industrial accidents and minimize injuries when accidents occur.

16.16 The employees individually must comply with all safety rules and cooperate with management in the carrying out of the accident prevention program.

[63] 16.2 To make effective the above statements and promote on the job accident prevention, employer-employee

committees will be established in each port. These committees will consist of equal numbers of employer and employee representatives at the job level. Each category of employees should be represented. Employers' representatives should be from the supervisory level. The purpose of the committees will be to obtain the interest of the men in accident prevention by making them realize that they have a part in the program, to direct their attention to the real causes of accidents and provide a means for making practical use of the intimate knowledge of working conditions and practices of the men on the job. It is further intended that this program will produce mutually practical and effective recommendations regarding corrections of accident-producing circumstances and conditions.

• • •

[79] SECTION 18

Good Faith Guarantee

18.1 As an explicit condition hereof, the parties are committed to observe this Agreement in good faith. The Union commits the locals and every longshoreman it represents to observe this commitment without resort to gimmicks or subterfuge. The Employers give the same guarantee of good faith observance on their part.

[80] SECTION 19

Steam Schooners

19.1 The provisions of this Agreement shall apply to all longshoreman's work, as defined in Section 1, on or in connection with steam schooners with the exceptions as set forth below:

19.11 A steam schooner is any dry cargo vessel plying in the steam schooner trade.

Exhibit 4

19.12 The steam schooner trade is hereby defined as the operation of steam schooners between the ports of California, Oregon and Washington and between these ports and British Columbia and Alaska; provided that such definition does not include vessels operating between Seattle and Puget Sound ports and Alaska.

19.13 Longshoremen shall perform all deck work and subject to 1.3, shall work aboard ships in accordance with the following:

19.131 Steam schooners are Class A when longshoremen are being assigned all of the longshore work except the work performed at one hatch or gear, or the work being performed in the handling of certain cargoes requiring the use of two gears, such as piling, poles, logs, etc.

19.132 On each call of a steam schooner operating Class A: at any port the employer assigns the vessel's members of the deck department (hereinafter referred to as "sailor gang") to one hatch selected for reasons of good ship operations. During such call the sailor gang is shifted out of that hatch [81] to handle cargo at another hatch only as stated above in 19.131 or when sufficient longshoremen are not available. For the purposes herein, San Francisco is one port and the East Bay is one port.

19.133 Gear up or down and hatches off or on by the sailors is permitted on Class A vessels. The time for starting longshoremen shall not be delayed beyond the regular starting time for starting a shift in order to permit sailors to do such work.

19.134 Tidewater ports that have a working arrangement which depends on conditions of the tide rather than the hours of the day should define such practices by a local working rule or rules, and until they are placed in writing such past practices shall continue.

19.14 LSM-type vessels are Class A provided that longshoremen perform the following work at all times they are available: two hook-on men, one utility man, one hatch tender and, subject to 1.3, one crane operator, both in loading and discharging. Longshoremen shall perform work aboard these vessels only when called upon to do so.

19.15 When an employer fails to assign sufficient work to longshoremen at any hatch or hatches to meet the qualifications for Class A, then a vessel is Class B and in connection therewith longshoremen shall perform work aboard ship only when called upon to do so.

19.151 A vessel may switch from Class A to Class B or from Class B to Class A on an hour by hour basis.

[82] 19.2 No arbitrator may consider or determine any issue regarding the scope of work of longshoremen or others to perform cargo work on steam schooners or make any decision denying the right of crew members to perform such cargo work, but the arbitrators may determine any other question or issue arising in connection with the steam schooner trade, including issues arising under Section 11 and issues regarding classifications A and B.

* * *

[83] SECTION 21

Welfare, Pension, Mechanization and Modernization Plans

21.1 The parties hereto have agreements on the subjects of Welfare, Pensions and on Mechanization and Modernization for longshoremen covered by this Agreement as set forth in the Second Amended ILWU-PMA Welfare Agreement and ILWU-PMA Welfare Fund—Declaration of Trust, the First Amended ILWU-PMA Pension Agreement

and ILWU-PMA Pension Fund—Declaration of Trust, the ILWU-PMA Supplemental Agreement on Mechanization and Modernization and the Trust Indentures established under the ILWU-PMA Mechanization and Modernization Plan.

[84] SECTION 22

Modification

22.1 No provision or term of this Agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto.

22.2 All joint working and dispatching rules shall remain in effect unless changed pursuant to Section 15. All other restrictions on the employer or longshoremen that are in conflict with the provisions of this Agreement are null and void.

22.3 The parties agree to meet for the purpose of codifying their agreement with respect to the subject matter covered in arbitrators' awards and rulings of the Joint Coast Labor Relations Committee. The parties will incorporate that agreement into the Pacific Coast Longshore Agreement at a time and in a manner to be agreed to by the parties.

Exhibit 4

[85] IN WITNESS WHEREOF, the parties hereto have signed this Agreement setting forth their agreement signed May 9, 1962 as modified on June 22, 1962.

PACIFIC MARITIME ASSOCIATION
on behalf of its members.

/s/ J. Paul St. Sure
/s/ J. A. Robertson

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION
on behalf of itself and each and all of its longshore locals in California, Oregon and Washington and all employees performing work under the scope, terms and conditions of this Agreement.

/s/ Harry Bridges
/s/ H. J. Bodine
/s/ L. B. Thomas

Exhibit 4

[86] WAGE SCHEDULE 1962-1963 * BASE RATE

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.06	4.59	6.885	5.51	8.265
10¢	3.16	4.74	7.11	5.66	8.49
20¢	3.26	4.89	7.335	5.81	8.715
30¢	3.36	5.04	7.56	5.96	8.94
45¢	3.51	5.265	7.90	6.185	9.28
80¢	3.86	5.79	8.685	6.71	10.065
85¢	3.91	5.865	8.80	6.785	10.18
$1.20	4.26	6.39	9.585	7.31	10.965
Explosives	6.12	9.18	13.77	10.10	15.15

[87] WAGE SCHEDULE 1962-1963 * 15¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.21	4.815	7.22	5.78	8.67
10¢	3.31	4.965	7.45	5.93	8.895
20¢	3.41	5.115	7.67	6.08	9.12
30¢	3.51	5.265	7.90	6.23	9.345
45¢	3.66	5.49	8.235	6.455	9.68
80¢	4.01	6.015	9.02	6.98	10.47
85¢	4.06	6.09	9.135	7.055	10.58
$1.20	4.41	6.615	9.92	7.58	11.37
Explosives	6.27	9.405	14.11	10.37	15.555

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[88] WAGE SCHEDULE 1962-1963 * 20¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.26	4.89	7.335	5.87	8.805
10¢	3.36	5.04	7.56	6.02	9.03
20c	3.46	5.19	7.785	6.17	9.255
30¢	3.56	5.34	8.01	6.32	9.48
45¢	3.71	5.565	8.35	6.545	9.82
80¢	4.06	6.09	9.135	7.07	10.605
85¢	4.11	6.165	9.25	7.145	10.72
$1.20	4.46	6.69	10.035	7.67	11.505
Explosives	6.32	9.48	14.22	10.46	15.69

[89] WAGE SCHEDULE 1962-1963* 25¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.31	4.965	7.45	5.96	8.94
10¢	3.41	5.115	7.67	6.11	9.165
20¢	3.51	5.265	7.90	6.26	9.39
30¢	3.61	5.415	8.12	6.41	9.615
45¢	3.76	5.64	8.46	6.635	9.95
80¢	4.11	6.165	9.25	7.16	10.74
85¢	4.16	6.24	9.36	7.235	10.85
$1.20	4.51	6.765	10.15	7.76	11.64
Explosives	6.37	9.555	14.33	10.55	15.825

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[90] WAGE SCHEDULE 1962-1963* 30¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.36	5.04	7.56	6.05	9.075
10¢	3.46	5.19	7.785	6.20	9.30
20¢	3.56	5.34	8.01	6.35	9.525
30¢	3.66	5.49	8.235	6.50	9.75
45¢	3.81	5.715	8.57	6.725	10.09
80¢	4.16	6.24	9.36	7.25	10.875
85¢	4.21	6.315	9.47	7.325	10.99
$1.20	4.56	6.84	10.26	7.85	11.775
Explosives	6.42	9.63	14.445	10.64	15.96

[91] WAGE SCHEDULE 1962-1963* 40¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.46	5.19	7.785	6.23	9.345
10¢	3.56	5.34	8.01	6.38	9.57
20¢	3.66	5.49	8.235	6.53	9.795
30¢	3.76	5.64	8.46	6.68	10.02
45¢	3.91	5.865	8.80	6.905	10.36
80¢	4.26	6.39	9.585	7.43	11.145
85¢	4.31	6.465	9.70	7.505	11.26
$1.20	4.66	6.99	10.485	8.03	12.045
Explosives	6.52	9.78	14.67	10.82	16.23

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[92] WAGE SCHEDULE 1963-1964* BASE RATE

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.19	4.785	7.18	5.74	8.61
10¢	3.29	4.935	7.40	5.89	8.835
20¢	3.39	5.085	7.63	6.04	9.06
30¢	3.49	5.235	7.85	6.19	9.285
45¢	3.64	5.46	8.19	6.415	9.62
80¢	3.99	5.985	8.98	6.94	10.41
85¢	4.04	6.06	9.09	7.015	10.52
$1.20	4.39	6.585	9.88	7.54	11.31
Explosives	6.38	9.57	14.355	10.525	15.79

[93] WAGE SCHEDULE 1963-1964* 15¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.34	5.01	7.515	6.01	9.015
10¢	3.44	5.16	7.74	6.16	9.24
20¢	3.54	5.31	7.965	6.31	9.465
30¢	3.64	5.46	8.19	6.46	9.69
45¢	3.79	5.685	8.53	6.685	10.03
80¢	4.14	6.21	9.315	7.21	10.815
85¢	4.19	6.285	9.43	7.285	10.93
$1.20	4.45	6.81	10.215	7.81	11.715
Explosives	6.53	9.795	14.69	10.795	16.19

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[94] WAGE SCHEDULE 1963-1964* 20¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.39	5.085	7.63	6.10	9.15
10¢	3.49	5.235	7.85	6.25	9.375
20¢	3.59	5.385	8.08	6.40	9.60
30¢	3.69	5.535	8.30	6.55	9.825
45¢	3.84	5.76	8.64	6.775	10.16
80¢	4.19	6.285	9.43	7.30	10.95
85¢	4.24	6.36	9.54	7.375	11.06
$1.20	4.59	6.885	10.33	7.90	11.85
Explosives	6.58	9.87	14.805	10.885	16.33

[95] WAGE SCHEDULE 1963-1964* 25¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.44	5.16	7.74	6.19	9.285
10¢	3.54	5.31	7.965	6.34	9.51
20¢	3.64	5.46	8.19	6.49	9.735
30¢	3.74	5.61	8.415	6.64	9.96
45¢	3.89	5.835	8.75	6.865	10.30
80¢	4.24	6.36	9.54	7.39	11.085
85¢	4.29	6.435	9.65	7.465	11.20
$1.20	4.64	6.96	10.44	7.99	11.985
Explosives	6.63	9.945	14.92	10.975	16.46

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[96] WAGE SCHEDULE 1963-1964* 30¢ SKILL

None	3.49	5.235	7.85	6.28	9.42
10¢	3.59	5.385	8.08	6.43	9.645
20¢	3.69	5.535	8.30	6.58	9.87
30¢	3.79	5.685	8.53	6.73	10.095
45¢	3.94	5.91	8.865	6.955	10.43
80¢	4.29	6.435	9.65	7.48	11.22
85¢	4.34	6.51	9.765	7.555	11.33
$1.20	4.69	7.035	10.55	8.08	12.12
Explosives	6.68	10.02	15.03	11.065	16.60

[97] WAGE SCHEDULE 1963-1964* 40¢ SKILL

Penalty**	First and Second Shifts			Third Shift	
	ST	OT	1½ OT	0-5 Hrs	6th Hr
None	3.59	5.385	8.08	6.46	9.69
10¢	3.69	5.535	8.30	6.61	9.915
20¢	3.79	5.685	8.53	6.76	10.14
30¢	3.89	5.835	8.75	6.91	10.365
45¢	4.04	6.06	9.09	7.135	10.70
80¢	4.39	6.585	9.88	7.66	11.49
85¢	4.44	6.66	9.99	7.735	11.60
$1.20	4.79	7.185	10.78	8.26	12.39
Explosives	6.78	10.17	15.255	11.245	16.87

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[98] WAGE SCHEDULE 1964-1965* BASE RATE

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.32	4.98	7.47	5.975	8.96
10¢	3.42	5.13	7.695	6.125	9.19
20¢	3.52	5.28	7.92	6.275	9.41
30¢	3.62	5.43	8.145	6.425	9.64
45¢	3.77	5.655	8.48	6.65	9.975
80¢	4.12	6.18	9.27	7.175	10.76
85¢	4.17	6.255	9.38	7.25	10.875
$1.20	4.52	6.78	10.17	7.775	11.66
Explosives	6.64	9.96	14.94	10.955	16.43

[99] WAGE SCHEDULE 1964-1965* 15¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.47	5.205	7.81	6.245	9.37
10¢	3.57	5.355	8.03	6.395	9.59
20¢	3.67	5.505	8.26	6.545	9.82
30¢	3.77	5.655	8.48	6.695	10.04
45¢	3.92	5.88	8.82	6.92	10.38
80¢	4.27	6.405	9.61	7.445	11.17
85¢	4.32	6.48	9.72	7.52	11.28
$1.20	4.67	7.005	10.51	8.045	12.07
Explosives	6.79	10.185	15.28	11.225	16.84

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[100] Wage Schedule 1964-1965* 20¢ Skill

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.52	5.28	7.92	6.335	9.50
10¢	3.62	5.43	8.145	6.485	9.73
20¢	3.72	5.58	8.37	6.635	9.95
30¢	3.82	5.73	8.595	6.785	10.18
45¢	3.97	5.955	8.93	7.01	10.515
80¢	4.32	6.48	9.72	7.535	11.30
85¢	4.37	6.555	9.83	7.61	11.415
$1.20	4.72	7.08	10.62	8.135	12.20
Explosives	6.84	10.26	15.39	11.315	16.97

[101] Wage Schedule 1964-1965* 25¢ Skill

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.57	5.355	8.03	6.425	9.64
10¢	3.67	5.505	8.26	6.575	9.86
20¢	3.77	5.655	8.48	6.725	10.09
30¢	3.87	5.805	8.71	6.875	10.31
45¢	4.02	6.03	9.045	7.10	10.65
80¢	4.37	6.555	9.83	7.625	11.44
85¢	4.42	6.63	9.945	7.70	11.55
$1.20	4.77	7.155	10.73	8.225	12.34
Explosives	6.89	10.335	15.50	11.405	17.11

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules.

Exhibit 4

[102] WAGE SCHEDULE 1964-1965* 30¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.62	5.43	8.145	6.515	9.77
10¢	3.72	5.58	8.37	6.665	10.00
20¢	3.82	5.73	8.595	6.815	10.22
30¢	3.92	5.88	8.82	6.965	10.45
45¢	4.07	6.105	9.16	7.19	10.785
80¢	4.42	6.63	9.945	7.715	11.57
85¢	4.47	6.705	10.06	7.79	11.685
$1.20	4.82	7.23	10.845	8.315	12.47
Explosives	6.94	10.41	15.615	11.495	17.24

[103] WAGE SCHEDULE 1964-1965* 40¢ SKILL

Penalty **	First and Second Shifts ST	OT	1½ OT	Third Shift 0-5 Hrs	6th Hr
None	3.72	5.58	8.37	6.695	10.04
10¢	3.82	5.73	8.595	6.845	10.27
20¢	3.92	5.88	8.82	6.995	10.49
30¢	4.02	6.03	9.045	7.145	10.72
45¢	4.17	6.255	9.38	7.37	11.055
80¢	4.52	6.78	10.17	7.895	11.84
85¢	4.57	6.855	10.28	7.97	11.955
$1.20	4.92	7.38	11.07	8.495	12.74
Explosives	7.04	10.56	15.84	11.675	17.51

* Effective 8:00 A.M. July 30, 1962—8:00 A.M. June 17, 1963

**Penalty Cargo List follows Wage Schedules

Exhibit 4

[104] PENALTY CARGO LIST

10¢ PENALTY

Following specified commodities in lots of 25 tons or more:

Alfalfa Meal.
Bones, untreated or offensive, in sacks.
Borate (Razorite) when packed in cloth containers with no inner lining.
Calcine Coke.
Caustic Soda in drums.
Celite and Decalite in sacks.
Coal in sacks.
Cement.
Creosote when not crated.
Creosoted wood products unless boxed or crated.
Fertilizers, following, in bags:
Tankage, animal, fish, fishmeal, guano, blood meal and bone meal.
Glass, broken, in sacks.
Green hides.
Herring, in boxes and barrels.
Iron blisters, molded, from Europe.
Lime, in barrels and loose mesh sacks.
Lime, dehydrated, in sacks.
Lumber, logs and lumber products loaded out of water.
Lumber, chemically treated, uncrated.
Lumber, freshly painted and paint is wet.
Meat scraps, in sacks.
Nitrate, crude, untreated in sacks.
Ore, in sacks.
[105] Phosphates, crude, untreated, in sacks (Not considered treated by the mere process of grinding).
Pig Iron, rough piled, when hand handled.
Plaster, in sacks without inner containers.
Refrigerated Cargo: Handling and stowing refrigerator space: meats, fowl and other similar cargoes to be transported at temperatures of freezing or below in boxes.
(In lots 25 tons or more, or if job lasts one hour or

more, penalty to apply on all time worked on refrigerator cargo.)

Rubber, Baled, Covered with Talc: To be paid to the gang actually handling this commodity including the deck men, front men, jitney driver and the dockmen working as part of the gang. If another gang is working in the same hatch on a non-penalty commodity, the ship gang members of said gang shall likewise be paid the penalty provided the holdmen of such gang are working the same deck or compartment as the gang handling the baled rubber covered with talc.

Sacks: Loading only and to apply to the entire loading operation where table or chutes are used and the men are handling sacks weighing 120 pounds or over on the basis of one man per sack.

Salt blocks in sacks.

Scrap meal in bulk and bales excluding rails, plates, drums, car wheels and axles.

[106] Soda ash in bags

Sulphur, dehydrated, in sacks.

Cargoes leaking or sifting due to damage or faulty containers:

Cottonseed meal in sacks.

Analine dyes.

Bichromate of soda in sacks.

Fish oil, whale oil and Oriental oils in drums, barrels or cases.

Lamp Black.

Tapioca Flour.

Working in cramped space:

Holdmen only—All paper and pulp in packages weighing 300 pounds or over per package only when winging up and when stowing in fore peaks, after peaks and special compartments

other than regular cargo spaces. (This does not apply to rolls:)

When there is less than six feet of headroom (a) loading cargo in hold on top of bulk grain (b) covering logs or piling with lumber products; paid to siderunners when used.

20¢ PENALTY

Shoveling—All commodities except those earning higher rate.

Creosoted products out of water — Holdmen and boom men only.

[107] 30¢ PENALTY

Bulk Grain—Boardmen only.

Bulk Phosphate Rock.

45¢ PENALTY

Bulk: Sulphur, Soda Ash, and Crude untreated Potash.

80¢ PENALTY

Bulk Bones, untreated or offensive.

85¢ PENALTY

Damaged cargo:

Cargo badly damaged by fire, collision, springing a leak or stranding, for that part of cargo only which is in a badly damaged or offensive condition.

Cargo damaged from causes other than those enumerated above, shall, if inspection warrants, pay the damaged cargo rate or such other rate deter-

Exhibit 4

mined by the Port Labor Relations Committee for handling that part of the cargo only which is in a badly damaged or offensive condition. This provision shall apply only to individual consignments which are damaged and shall not empower any committee to add to or detract from penalty cargo rates herein specified.

[108] $1.20 PENALTY

Working hatch when fire burning or cargo smoldering in hatch.

EXPLOSIVES

When working Class A explosives as defined by Interstate Commerce Commission regulation (Topping's Manual) all men working in connection with a ship which is loading explosives are to receive the penalty during such time as explosives are actually being worked.

• • •

Exhibit 5-A

[1] January 4, 1961

Report of PMA Committee on Work Improvement Fund Contributions Procedures

In General

This is the report and recommendation of the special PMA Committee appointed to study the appropriate method of dividing the costs of the ILWU Modernization and Improvement Fund set forth in the Memorandum of Agreement with the ILWU of October 18, 1960.

The amount to be raised is $5,000,000 per year for each of the years 1961 through 1965 and $2,500,000 for the period January 1, 1966, through June 30, 1966. The agreement with the Union leaves to the Association the method to be used in raising these amounts. In the negotiations it was made very clear to the Union that this question was to be a wholly internal PMA matter. The Committee recommends that the contributions to the Fund be raised on a cargo tonnage basis with an annual review by the Association to determine the equity of the formula as conditions change.

Methods of Contributions Considered

The Committee's principal deliberations centered on three methods of contribution—(1) contributions based on straight time man-hours of each employer; (2) contributions based on manifested cargo tonnage; (3) a combination of (1) and (2). These methods are discussed in detail below.

In addition to these methods of dividing the cost of the program, the Committee also discussed briefly several other methods which were finally discarded as not worthy of serious consideration. These included (a) raising part of

the Fund by a charge on a cargo tonnage moving in containers and (b) dividing the cost of the Fund by a contribution system based on specific [2] measurement of improvements in longshore productivity of each operator over a base year.

The first of these was felt to inhibit unnecessarily the development of this particular type of labor-saving operation and to penalize what is only one of many types of labor-saving techniques that are possible under the new agreement.

The productivity improvement measurement method has much to commend it. It is, at least at first blush, precise in placing the burden of the Fund on those benefiting from it. It was felt, however, that it would be a cumbersome and over-elaborate method of dividing the cost of the Fund and one that would be difficult to administer. Concern was expressed, for example, over the difficulty of determining the source of the productivity improvement and whether it could be attributed to the new agreement or whether it arose from an external factor such as a new terminal. One of the principal objections to such a plan was the view that the establishment of such a measurement system could lead to a renewal by the Union at the conclusion of the term of the present agreement of its demand for a share in the industry's productivity "savings." This was, in fact, the original demand of the Union when the negotiations which culminated in the Fund began. The Committee feels that PMA should avoid the establishment of an internal assessment system which is the very one the Union sought to impose on the industry and which, we are told, is still the position of several of the Union's influential leaders.

Exhibit 5-A

The Man-Hour versus the Cargo Tonnage Method

One of the principal methods proposed for the distribution of the cost of the Fund is one based on the number of hours of contract employment [3] given by each PMA employer. (It was assumed that those would be straight-time man-hours computed in the same manner as in the present PMA dues computation.) Most PMA funds, such as for pension, welfare and vacation benefits, are presently raised in this manner. To base the contributions on man-hours would, in effect, be to equate the Fund with wages. Some of the members of the Committee felt that the Fund was at least in part in payment for an agreement that would relieve all elements of the industry from contract work restrictions and should, therefore, be paid for on a wage basis since all operators can benefit from this aspect of the agreement.

The majority of the Committee, however, was of the view that the over-all intent of the agreement was to give the operators the freedom, each in its own way, *to reduce the number of man-hours* needed to load and discharge their cargo tonnage. They were struck by the inequity of a contribution formula based on man-hours which would provide for a decreasing percentage of the total contributions to the Fund by the operators which made greatest use of and received the greatest benefit from the new agreement. Thus, a hypothetical operator which could fully mechanize because of the freedom of operation permitted by the agreement would, if it eliminated all of its man-hours, pay nothing to the Fund that made its labor-saving possible. Even worse, such an operator would be substantially contributing to the loss of work opportunity of the ILWU work force. It is the fear of loss of work that has been the main impetus for the Union's insistence on obtaining this agreement and will undoubtedly be the principal ground for continuation or supplementation of

the Fund in future bargaining. Yet such an operator who would have aggravated the loss of work problem would make the least contribution to the Fund whose origin and existence is based on that problem.

[4] If all operators had an equal opportunity to make man-hour savings under the new agreement, there would be no serious objection to a man-hour method. Then it could be said that since each operator has an equal opportunity to shed man-hours and to reduce its share of the Fund contributions, it would have only itself to blame if it fell behind in the race to get rid of man-hours. But there is not an equality of opportunity for the inauguration of man-hour savings methods. Some steamship operators are engaged in trades where because of the types of cargo, multi-port operations or other operational problems involved, it is more difficult or less economically feasible to put into use labor-savings devices or techniques than in trades more suited to such methods.

It is argued, in favor of the man-hour approach, that the fact that an operator can reduce his share of the cost of the Fund by getting rid of man-hours makes such a method of contribution itself an important incentive to progress and efficiency in our industry. The Committee has taken the view, however, that the much larger savings of the cost of the man-hours themselves that are eliminated by taking advantage of the freedoms given by the new agreement are by all odds the prime incentive for labor-saving efforts and that the method of division of the cost of the Fund itself would not be a material influence. In short, the incentive factor that the method of contribution to the Fund represents is so minor that it should not interfere with the establishment of a contribution system that is equitable.

The elimination of both a man-hour formula and of a productivity improvement measurement method as bases

for Fund contributions leaves a formula based on cargo tonnage as the best remaining method of dividing the cost of the new agreement. This is the method the Committee recommends be adopted though admittedly it is a rough-and-ready way to divide the cost. [5] it lacks the precision of the productivity measurement method, for example. But it does divide the contribution on the basis of one form of measurement of volume of cargo-handling activity without being subject to the objectionable feature of the man-hour formula in which contributions are made in inverse proportion to realization of benefits from the new agreement.

The tonnage formula recommended by the majority of the Committee would be the same as the present tonnage formula used for the computation of a portion of the PMA dues. In this formula, bulk cargo tonnage is counted at one-fifth the value of general cargo tonnage. The tons are revenue tons—weight tons of 2,000 pounds, measurement tons of 40 cubic feet, and lumber at 1,000 board feet per ton. The cargo is that manifested for loading or discharging at Pacific Coast ports. Special rules apply to coastwise and transshipped cargo. The payments would be made by the employers of ILWU that is subject to the agreement.

Some Objectionable Features of the Tonnage Formula

There are some aspects of the tonnage formula that are objectionable. The majority of the Committee feels that these problems are less serious than those that would be created by adoption of the other alternative formulae, however.

Under a tonnage formula, all operators would be required to contribute to the cost of the new agreement. While it can be argued that this will force operators to contribute who expect to gain little advantage from the agreement, it is the view of the Committee that all operators should

contribute to the Fund on some basis because of the potential benefit that is available, in some degree at least, for all under the work restriction removal provisions of the agreement. Operators who expect to gain only small [6] benefit from the new agreement can, under the tonnage method, at least assure themselves that their contribution will not grow in future years as other more fortunately-situated operators begin eliminating substantial numbers of man-hours. The only alternative system that would meet the needs of such operators would be one measuring productivity. The objections to such a system have been discussed earlier in this report.

It has been suggested that adoption of the tonnage formula will create a poor precedent for future collective bargaining on mechanization and removal of work restrictions. It is true that the industry would not want a specified tonnage assessment permanently established by agreement with the Union as a charge on all future cargo tonnage. This would be an irrational and unconscionable arrangement that would build an ever-increasing fund as total Pacific Coast cargo tonnage increases through natural economic forces. But the formula the Committee is proposing is an internal one, not one agreed to with the Union, and, even more important, is one that raises an agreed sum of money for an agreed period of time. If any additional fund is to be raised after the conclusion of this agreement, both the amount and the duration of that arrangement will have to be negotiated. The fact that the present Fund would be raised internally by PMA on a tonnage basis is not felt by the majority of the Committee to be a sufficiently influential or dangerous precedent for such future bargaining as to warrant its abandonment. This is particularly true since the Union has never urged a tonnage formula as a means of paying for the Fund.

It should also be pointed out that a man-hour or combination man-hour tonnage formula, or any other formula

we might adopt, is equally subject to the same danger of being taken over some day by the Union. The assumption by [7] the Union at the end of the present agreement of a man-hour formula as the basis for the industry's payments to the Fund, together with a demand to pay an increased total dollar amount per year to the Fund (which might well be demanded if there were a dramatic reduction in man-hours in the industry in the next five years), would be a disaster to those operators who could not achieve substantial man-hour savings. The greater part of the burden of the expanded Fund would fall on them. If there is any risk of a "take-over" by the Union of the internal contribution formula we now adopt, it is the Committee's view that a formula using a man-hour basis would be the most dangerous from this standpoint of all. Only if the same dollar amount of contribution per man-hour were retained, could a Union "take-over" of the man-hour formula be relatively harmless and even then it would have the inherent inequity between members described previously.

Another problem created by a tonnage formula is that it fails to charge cargo-handling activities in terminal operations for the benefits those operations will receive under the new agreement. The Committee concluded, however, that virtually all of this cago is cargo that has been taken from a vessel or is destined for loading to a vessel. (It is estimated that only a small fraction of 1% of the total Pacific Coast cargo tonnage handled by longshore labor has not come from a vessel or is not destined for a vessel.) Thus, in most instances a charge against this tonnage would be a needless duplication of the proposed charge on manifested tonnage with the ultimate cost falling on the steamship operator in any event. Though there may be some few inequities in special circumstances arising from the proposed plan, it must be recognized that even greater

inequities arise from the adoption of the alternative man-hour formula.

[8] The entire lump sum benefits portion of the new agreement has Federal income tax problems under the applicable regulations, whatever contribution formula we adopt. It may be, however, that these serious problems are somewhat aggravated by a tonnage formula instead of a man-hour formula. The elimination of the tonnage formula will not, of itself, cure the problem, however. It will be some time before these tax problems are resolved. The Committee believes that the contribution formula the Association wishes to adopt, whatever it may be, should be put into effect. If it later appears that the elimination of that formula will help solve these tax problems, the formula could be converted retroactively to another with little more than some staff computation work and some payments adjustments, provided counsel moves to resolve the tax issue before the end of 1961. The Committee, after discussion with counsel, does not consider this tax factor a controlling one.

The Combination Man-Hour and Tonnage Formula—

The final vote of the Committee was not between a tonnage and a man-hour formula but instead between a tonnage formula and one based on a combination of tonnage and man-hours. The most frequently discussed combination is that now employed for the determination of the onshore portion of the PMA dues. (This is presently on an approximately 60% man-hour and 40% tonnage basis.) One of the principal arguments for this formula is that it would camouflage the method of contribution to the Fund so that it couldn't be pre-empted by the Union in future negotiations as the means of determining what the Union should get. It also contained a partial man-hour assessment to meet the demands of those who feel that at least that portion

of the new agreement covering removal of work restrictions should be paid for on a man-hour basis.

[9] The majority of the Committee rejected this type of formula, however, on the theory that since, as indicated above, the entire purpose of the new agreement was to gain freedom to eliminate man-hours, whether by containerization, removal of work restrictions or otherwise, a formula that even in part would reduce the contributions of those getting increased benefit from the plan would be, even to that extent, inequitable.

A report of a minority of the Committee urging adoption of this formula accompanies this report.

Annual Review—

In addition to the recommendation of the adoption of a tonnage formula made by the majority of the Committee, the entire Committee recommends an annual review by the Association of the contribution formula at the end of each of the calendar years in which the agreement is in effect. It is entirely possible that great changes in labor-saving techniques, tonnage and factors not foreseen at this time could cause the recommended formula to work a hardship on segments of the industry. Such annual reviews could lead to amendment of the formula to prevent the continuation of any such inequities that may develop.

COMMITTEE ON WORK IMPROVEMENT FUND CONTRIBUTION PROCEDURES

By PETER N. TEIGE,
Chairman

Exhibit 5-B

[1] Statement of Minority Opinion on ILWU Funding

This statement summarizes the minority viewpoint of the sub-committee of the Coast Steering Committee charged with recommending methods for allocating among PMA member companies payments due under the ILWU modernization and improvement agreement.

Throughout the committee discussions the basic point in question was simply the relative merits of an allocation scheme based on tonnage handled versus one based on man-hours used. At the last meeting of the committee a vote was taken which resulted in a 4 to 2 majority in favor of the tonnage basis of payment allocation. It is the minority opinion that equitable allocation of payments among all member companies cannot be accomplished on the basis of either tonnage or man-hours alone and that instead a combination of these two measures is needed whereby part of the fund would be accumulated by tonnage assessments and part by man-hour assessments. As an integral part of this opinion it is further recommended that the funding be started in proportion 40% from tonnage and 60% from man-hours, and that every six months this proportionality be subject to formal PMA review to correct inequities that will become apparent as we gain experience and data on performance and cost changes under the new agreement.

In support of this minority recommendation the following points are offered for consideration by the PMA Coast Steering [2] Committee:

(1) Funding on the basis of tonnage alone is in conflict with one of the basic agreed-on principles which guided negotiations for the modernization and improvement fund. This agreement recognized that there were many kinds of improvements available to the industry such as improved

docks, better terminal facilities, more effective supervision, better planning, improved ship designs, etc., which did not involve ILWU participation or concurrence and therefore did not incur any industry responsibility to the union. Largely for this reason the industry firmly rejected the union's proposal for a tonnage tax, pointing out that such a tax would contain an appreciable amount of un-earned tribute to the union and a significant penalty on management incentive. That we are now talking only about an intra-industry allocation scheme in no way changes the basic principle involved. Assessment on the basis of tonnage alone would still result in unfair discrimination against those management prerogatives that have no direct relationship to the objectives of the fund.

(2) Another guiding principle throughout the modernization and improvement negotiations was that mechanization and methods improvements could not be isolated from each other and their relative contributions to labor saving neatly measured. Nor could different companies adapt to or participate in specific innovations in any uniform way. For this reason the industry strongly resisted union pressures to [3] categorize specific improvement opportunities and instead insisted on a general buy-out of restrictive practices consistent with safe and humane working conditions. With this general approach it was agreed that all PMA members would have ample opportunity to share in some degree the benefits to be derived from the fund. In particular it is clear that all users of ILWU labor have something to gain from the elimination of restrictive work practices, whereas the opportunities for outright mechanization can be expected to vary widely from company to company. Assessment on either a pure tonnage or a pure man-hour basis would ignore these basic facts. For example there are many users and uses of ILWU man-hours that would not be covered under the tonnage reports to PMA,

which include only tons handled into and out of a port by member companies on a one-time basis. Thus the appreciable fraction of long-shore labor used in terminal and dock work or in cargo re-handling for operators' convenience would be participating in the fund free of cost to the employers of this labor. Under the tonnage assessment this cost would have to be spread over those employers reporting PMA tonnages, rather than be borne by the direct employer who has the most immediate opportunity to benefit from the improvements the fund is paying for. Similarly, an all-manhour assessment would ignore differences in labor-saving opportunity, but since no one is recommending this form of assessment it need not be discussed [4] further here. The point is that a combination tonnage-manhour assessment avoids the inequities of either one alone and in addition conforms to the original intent in the negotiations.

(3) Inherent in the funding agreement itself is an argument favoring the combination tonnage-manhour assessment. By specific agreement with the union the total fund will be accumulated in two separate and distinct parts: one at a rate of $2,000,000 per year to cover the guaranteed wage portion of the contract, and one at a rate of $3,000,000 per year to cover death and disability and supplemental retirement benefits. Since the first of these is insurance against a too-rapid loss in work opportunity, it is inconceivable that those companies who are most successful in reducing their labor requirements should contribute in decreasing proportion to the cost of this insurance. Clearly this is a case where the man-hour assessment would be inequitable and the tonnage assessment appropriate. On the other hand, the benefits portion of the total fund is to take care of career longshoremen as they drop out of the workforce at or near the normal rate of attrition. These men have been in the workforce because of the demands or tolerance of everyone employing ILWU labor and they are

therefore the responsibility of all companies who have been employing this labor in the past whether or not this employment can be directly related to incoming or outgoing cargo [5] on ships. For this portion of the fund then it seems clear that a man-hour assessment would be appropriate and equitable. This reasoning leads to the 40-60 ratio for tons and man-hours mentioned in the minority recommendation.

(4) On the matter of judging the equity of a tonnage versus a combination tonnage-manhour assessment it is unfortunately true that adequate data do not exist for a direct comparison of the two schemes. For this reason it is considered ill-advised to move to an entirely new assessment scheme until we have gained some operating experience under the new contract. The present assessment scheme for support of PMA operations has for some time corresponded roughly to the combined tonnage-manhour ratio developed in paragraph 3 above and since no great inequities have become apparent under its use it seems reasonable to expect that a continuation of this formula for a trial period would not create any undue hardships. It is not the minority contention that this should necessarily be the ultimate formula but only that it is a workable one until equitable adjustments can be made in the light of more quantitative knowledge of the issues involved.

(5) Initial use of the present PMA assessment formula has some significant minor advantages that should not be overlooked. In the first place the necessary reporting scheme already exists and is operating. A shift to an all-tonnage assessment would create a number of troublesome [6] problems that cannot be evaluated at this time. For example, in the case of non-member companies, the union now sees that man-hour assessments are paid to PMA. No such arrangement exists for administering a tonnage collection. Presumably one could be developed but it would set the

dangerous precedent of placing a tonnage tax in union hands—the very thing we have told them we could not and would not do.

(6) There are troublesome legal questions relating to the funding of benefits on a tonnage basis. There is no precedent for such funding and this is certain to create questions within Internal Revenue Service regarding the deductability of such contributions for tax purposes. Even if these questions can be ironed out it is likely that such contributions would have to be paid through stevedoring companies rather than directly to PMA.
1/4/61

Exhibit 6

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

January 11, 1961

TO MEMBERS.

At the Membership Meeting on Tuesday, January 10, 1961, duly called by notice dated January 5, 1961, a vote was taken on the method to be used for contributions to the ILWU-PMA Modernization and Improvement Fund.

The action taken by the Membership was as follows:

> "It was regularly moved and seconded that the majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with

the understanding that the method of collection will receive continued study and be presented to the Membership again in six months."

A secret ballot was taken and the vote was polled as follows:

246—Yes
74—No
21—Withheld
67—Absent

Motion carried by a majority of the total voting strength of the Association Membership.

[2] A vote was also taken on the recommendation of the Board of Directors that the Agreement dated October 18, 1960, between the ILWU and PMA be ratified. This motion carried unanimously.

The Treasurer will notify you as to the contribution rates and effective date.

We call your attention to Section 3, Article XI of the Association's By-Laws, reading as follows:

"A member who has not authorized or accepted in writing such contract, commitment or undertaking and who has not voted in favor of the approval thereof or the delegation of authority with respect to the particular terms thereof shall not be bound by such contract, commitment or undertaking, if such member resigns within seven (7) days after the date of the vote thereon, whether taken in advance of or during the negotiations, or subsequent to the drafting of the contract, agreement or commitment in final form and submission to the membership for approval."

J. A. ROBERTSON,
Secretary.

JAR:ah

Exhibit 7

[1] WINCHESTER AGENCIES, INC.
Steamship Agents and Brokers
351 California Street
San Francisco 4, Calif.

January 17, 1961

Pacific Maritime Association
16 California Street
San Francisco, California

Attention: Mr. Paul St. Sure

Re: Volkswagen Importations
PMA Special Tonnage Assessment

Gentlemen:

We understand that to finance a mechanization and improvement fund as recently agreed with the ILWU, the Pacific Maritime Association had adopted a special tonnage assessment of 27.5 cents per ton on general cargo and 5.5 cents per ton on bulk cargo. We are informed that the PMA proposes to levy this assessment per ton weight or measurement as manifested and reported to the PMA during 1959.

We are under instructions from our principals, Messrs. Volkswagenwerk, A. G. Shipping Department, Wolfsburg/Hanover, West Germany, to protest the application by Pacific Maritime Association of an assessment on a measurement basis against the discharge of unboxed automobiles. Our principals and we share with the PMA the hope that the recently concluded agreement with the ILWU will result in improvements of cargo-handling efficiencies and lowering of the net costs thereof on the Pacific Coast. On the other hand, we can only conclude that the Directors of your Association were not aware of the discriminatory burden

which a measurement ton basis of this special tonnage assessment would imopse on the discharge of unboxed automobiles, viz:

On the premise that $12.50 per revenue ton is the current average discharge cost of *packaged general cargo,* a tonnage assessment of 27.5 cents per ton W/M represents an approximately *2.2% increase in cargo-handling expenses.* On the other hand, a measurement assessment of 27.5 cents per 40 cubic feet on typical shipments of *unboxed Volkswagen autos* represents an *increase of more than 26% in the discharge costs of this commodity.*

[2] *Illustration*—Assuming shipment 50% VW sedans and 50% VW transporters with current discharge costs $10.45 per auto:

	Sedan	*Transporter*	*Average*
Typical weight	1609 lbs.	2447 lbs.	2028 lbs.
" measurement	8.3 tons	11.8 tons	10.0 tons
Assessment 27.5 cents per ton equals assessment per auto basis weight ton 2000#	$0.22	$0.336	$0.278
Equivalent increased costs	2.1%	3.2%	2.7%
Basis measurement ton 40 cft.	$2.28	$3.245	$2.76
Equivalent increased costs	21.8%	31.0%	26.4%

In view of the foregoing, it is requested that the Pacific Maritime Association reconsider the basis of the proposed tonnage assessment on the importation of unboxed foreign automobiles. We shall hold ourselves in readiness to discuss this matter in further detail with your Directors if

you so desire. In the meantime, may we offer the following additional comments:

1. Most of the Volkswagen movements to this Coast are effected in full cargo shipments in vessels under charter by Volkswagenwerk, A.G. Such vessels include timecharters or lumpsum FIO charters. Under timecharter, the auto manufacturer pays for the use of the vessel at a fixed rate per interval of time. Under the FIO charters, the freight is expressed as a lumpsum for a specific voyage. The timecharter hire or the lumpsum FIO freight gives to the charterer the exclusive use of the vessel and is payable to the shipowner irrespective of the number of automobiles actually aboard. The manifest and bills of lading covering such charter-ship movements reflect the number of autos and the weight in kilos. Because the freight is covered by timecharter hire or lumpsum FIO freight for the use of the entire vessel, the manifest and bills of lading do not reflect any specific rate or total freight, such being covered by the notation "freight prepaid" or "freight as agreed."

2. In the Europe to Pacific Coast run the volume of cargo is rarely sufficient to fully utilize either the available deadweight or cubic of the Liners in this trade. Accordingly, cubic alone is not the criterion in establishing freight rates on those Volkswagen units which are lifted by the Liners to the Pacific Coast, and the contracts of affreightment between Volkswagenwerk, A.G. and the Liner companies involved are predicated on a lumpsum freight rate per auto.

3. The practical insignificance of the actual measurement of unboxed VW autos is emphasized by the fact that the stevedoring rates for discharging the vessels chartered by Messrs. Volkswagenwerk, A.G. work out to [3] the same

unit-equivalent irrespective of whether it is a sedan model (1609 lbs. and 333 cu. ft) or a transporter (average 2447 lbs. and 472 cu. ft.). Obviously, the automobile manufacturer in Europe has had no control over the method of reporting to the PMA by the stevedore companies on this Coast.

4. How a commodity is "manifested" or "freighted" is not necessarily an equitable criterion on which to base a tonnage assessment. For example, the Intercoastal ocean freight rate structure is all keyed to a weight basis; accordingly, if the basis of "manifesting" were the sole key to the reporting and levying of a tonnage assessment, any automobiles in that trade would be assessed on a unit of 2000 lbs.

5. The California State wharfage on unboxed automobiles is based on a weight ton of 2000 pounds.

6. As illustrated above, application of a measurement ton assessment against unboxed automobiles would impose upon the importation of this commodity a contribution to the "mechanization and improvement fund" at a level 10 to 15 times greater than the like contribution with packaged general cargo. This distortion is further magnified by the expectation that some overall net savings may be effected through the mechanized handling of packaged general cargo, whereas at this juncture we do not visualize any practical application of mechanization to the discharge of unboxed autos.

Your Directors must surely be aware of the diminishing sales in this country of most foreign autos—with the exception of Volkswagens. The ability of our principals to maintain competitive standing with the American manufacturers of "compact cars" is largely contingent upon holding down costs of production and delivery. The threat

alone by PMA to attempt imposition of a 21% to 31% cargo-handling levy against the importation of Volkswagen autos injects a damaging instability to the sales potential of our principals, the extent of which damages can be measured by the current volume of Volkswagen imports to this Coast (approximately 30,000 units per year) and the long-term freighting contracts to which our principals are committed.

In conclusion, we are compelled to request immediate action by the Pacific Maritime Association to remove the threat of tonnage assessment on a measurement basis against the importation of unboxed foreign automobiles. Failing timely and affirmative action by your Association, we shall have no recourse but to seek legal order to remove this overwhelming discrimination which is implicit in an attempted levy at a level 10 to 15 times greater than assessed on other general cargo. Furthermore, you may expect legal action against the Pacific Maritime Association for recovery of damages, suffered by Volkswagenwerk, A.G. and the distributors of these autos on the Pacific Coast, resulting from such restraint of trade.

Very truly yours,

WINCHESTER AGENCIES, INC.—As Agents
/s/ PETER CURTIS
Peter Curtis, Vice President

cc: Volkswagenwerk, A.G.
Shipping Department
Wolfsburg/Hanover, West Germany

Exhibit 9

[1] MARINE TERMINALS CORPORATION

Cable Address "Marineterm"

Contracting Stevedores & Terminal Operators

March 1, 1961

Mr. K. F. Saysette, Vice President & Treasurer
Pacific Maritime Association
16 California Street
San Francisco, California

Mechanization & Modernization
Fund Collections

Dear Mr. Saysette:

We have been informed by Winchester Agencies, Inc., agents for Messrs. Volkswagenwerk, A. G. and by Waterman Corporation of California, agents for Walleniusrederierna, that they are refusing payment of the newly adopted Mechanization and Modernization Fund based on the measurement of automobiles discharged.

Upon instructions from the principals' offices in Wolfsburg, Germany, and Stockholm, Sweden, they were advised that they feel that the placement of this assessment on a measurement basis is unjust and it increases the cost of handling by some 35%.

We have informed them that we at Marine Terminals Corporation are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter.

They also have instructed their agents that if our rates are renegotiated and the assessment is placed in the rate, they will continue to deduct the 27½¢ per measurement ton.

Exhibit 10

We find ourselves in a very awkward position and wish to be advised of the committee's decision on how automobiles will be assessed and what stand we can take in demanding payment of this assessment.

Very truly yours,

Ellett G. Horsman,
ELLETT G. HORSMAN,
Vice President.

EGH:mb

Exhibit 10

[1] March 3, 1961

Mr. J. Paul St. Sure
Pacific Maritime Association
16 California Street
San Francisco 11, California

Dear Paul:

The Committee on Work Improvement Fund Contributions Procedures has considered the communications enclosed with your letter of January 24, 1961, and similar letters subsequently forwarded to the Committee. The gist of these letters is that the Work Improvement Fund assessment, as presently constituted, is burdensome to the traffic concerned. The traffic asking special consideration is: Volkswagen and other foreign car imports, bulk rice in containers, bananas, Army conexes, and coastwise cargo including lumber. After careful consideration of each of these protests, the Committee recommends that, with the exception of Army conexes and coastwise cargo, there be no change in the present method of fund assessments.

Exhibit 10

The arguments advanced by the companies complaining of the assessment can be generally summarized as claiming that the assessment cost for a particular commodity is high in comparison with the longshore labor cost for that commodity. Thus, the foreign car import people point out that by basing the assessment on these vehicles on measurement tons the assessment substantially increases their labor costs. This results from the low labor content in the discharging operation for such vehicles. Similarly, the banana operators claim that bananas are nearly like bulk cargo and should not be charged a full general cargo assessment. In both instances, however, further labor saving is possible. It must also be recognized that each general cargo operator could go through its list of commodities and find some which are handled by an operation with a high labor content per ton and others with a low labor cost. The Committee feels that save for the traditional exception of bulk cargoes, there should be no special adjustment of the tonnage assessment by commodity. If the assessment rate were adjusted for one claim of this type, then consideration would have to be given to all similar claims, and the present general assessment would be in danger of being made into an assessment rate structure similar to a tariff, with all of the problems attendant thereon. For these reasons, the Committee feels that claims of this nature should be rejected. However, it also is of the view that claims based on inequities between operators who are handling the same or similar cargo in a similar manner should be explored for the possible need for adjustments to equalize the positions of such operators.

[2] In the matter of Army conexes, it is the contention of the interested parties that, because of the non-commercial cargo manifesting practices used by the military, empty conexes are assessed at the measurement ton capacity of the conex, whereas empty commercial containers owned by

the carriers are not manifested and not assessed. Similarly, Army conexes containing cargo are manifested and therefore presently assessed at the full measurement ton capacity of the conex instead of on the manifested measurement (or weight, as the case may be) basis of the cargo therein contained; as is the practice with commercial operators handling containers. It is the opinion of this Committee that Army conexes should be assessed in the same manner as commercial containers moving in the trade in question.

The Army also has questioned the use of measurement tons in assessing vehicles. Since commercial operators are being assessed on a measurement basis, we believe this complaint has no merit. In short, the Committee wants all military cargo assessed on the same basis as commercial cargo moving in the trade in question.

The Isbrandtsen Company request is a little less easy to categorize. Until fairly recently rice has been handled entirely in bags. Now some 60% of Bay Area rice for Puerto Rico is going in bulk in a specially-built vessel. In order to keep some of the remaining business, Isbrandtsen plans to carry rice in bulk in 10-ton containers with the containers being filled at the shipper's place of business. A freight rate based on rice in bags would be charged. They request a bulk instead of general cargo assessment on this movement. It is the view of the Committee that a container movement should be treated as a general cargo, not a bulk cargo movement, whatever the contents of the container. This operator apparently has the choice of handling this cargo under present circumstances only in bags or containers since it has withdrawn a tariff rate based on bulk carriage that it had filed with the Federal Maritime Board. Either rice in bags or containers requires the general cargo assessment. The Committee is of the view that no exception should be made in this case in order to

make the operator competitive with another method of operation (bulk loading). It is not the function of the assessment to equalize competition. The Committee feels that any commodity which could be handled as bulk cargo but is instead handled in a container or package must be treated as general cargo for purposes of this assessment. This is particularly true where the movement is in containers, an operation that was a key factor in causing this Fund to exist.

The matter of the coastwise trade is a particularly difficult one. The argument is that in this trade the same ton of cargo is assessed twice, once when it is loaded onto a vessel and again when it is loaded off of the vessel. It is also a very marginal business economically.

[3] The industry has traditionally recognized the problems of the coastwise industry when it has assessed the dues collected by the Association that are based on tonnage by charging cargo only once for the assessment. Though it is not entirely a logical distinction because of the double opportunity for labor saving in such an operation, it is the recommendation of the Committee that coastwise cargo be assessed in the traditional manner at a rate of one-half of the Work Improvement Fund rate for offshore and intercoastal cargo. That is to say, a single ton of coastwise cargo would pay a *total* of 27½¢ Work Improvement Fund assessment, one-half at the point of loading and the other half at the point of discharge.

A minority of the Committee is of the view that a full assessment should be made on both coastwise loading and discharging. It took the view that the problems of the coastwise trade do not arise from the manner of dividing the cost of this Fund but from the economic weakness of the industry resulting from years of land carrier competition and high operating costs and that there is no logical

basis for excluding this traffic from paying its share of the cost of this Fund.

One of the coastwise operators that has protested the Fund contribution rate is W. R. Chamberlin and Company. They have, in addition to the double assessment problem, also called attention to the penalty rate of $1.00 straight time charge, the so-called Class B Steam Schooner rate, arising from the use of seamen for cargo operations. We believe to the extent that that penalty rate is paid for work flexibility and not for allowing another union to perform longshore work, this is an other reason for the coastwise half-rate rule.

The Committee also voted to have transshipped cargo assessed both for the discharge from the first carrier and the loading into the vessel of the connecting carrier.

The recommendation of this Committee concerning coastwise cargo will answer, insofar as is possible, the letter from Oliver J. Olson and Company. However, Mr. Saysette has given to this Committee another letter concerning the Olson Company, in which the PMA Southern California Area Manager has pointed out that the Olson Company has a direct contract with the ILWU for their stevedoring operations, and that other companies are competitively concerned whether Olson is also paying the Work Improvement Fund assessment. This raises a basic problem resulting from the lump sum settlement made by PMA with the ILWU. It is obviously important that employers or operators dissatisfied with the assessment not be permitted to avoid the assessment by resigning. Furthermore, it is essential that non-members be required to pay a similar assessment for competitive reasons. For these reasons we must ask the Union for its assurance that the [4] same assessment will be applied to non-member users of longshore labor. The Committee also urges that an effort be made to have non-members join PMA and pay the assess-

ment to PMA instead of directly to the Union since this will have the effect of reducing the assessment for all, including the new member, in view of the lump sum nature of our settlement.

For the
COMMITTEE ON WORK IMPROVEMENT
FUND CONTRIBUTIONS PROCEDURES
PETER N. TEIGE,
Chairman.

PNT:jg

Exhibit 11

[1] PACIFIC MARITIME ASSOCIATION
Southern California Area
750 Broad Avenue
Wilmington, California

March 24, 1961

Mr. K. F. Saysette
Pacific Maritime Association
16 California Street
San Francisco 11, California

Subject: Mechanization Assessment—
Refusal to Pay

Dear Ken:

Captain Anthony of Associated-Banning Company called me in an extremely disturbed state this afternoon and discussed the attached correspondence with me. I indicated there was little I could do about it at this level, and suggested he supply me with copies of the letter for forwarding to you.

Exhibit 12

Banning is very much concerned inasmuch as approximately $1,500 is involved in back assessments and the status of future jobs is certainly clouded.

Could you give this your prompt attention and advise me if anything further should be done at this level.

Very truly yours,

J. D. MacEvoy,
J. D. MacEvoy,
Area Manager.

JDM:ae
Attachment

Exhibit 12

[1] Waterman Corporation of California
Steamship Agents
Seattle - Portland - San Francisco - Los Angeles
P. O. Box 667
Wilmington, California

March 23, 1961

Associated Banning Co.
P. O. Box 816
Wilmington, Calif.

Attention: Mr. J. H. Anthony

Re: Mechanization & Modernization
Assessments on Automobiles

Gentlemen:

Reference to your bills number 2-116, 2-117 and 2-118, covering rebilling of automobiles tonnage from a weight basis to a measurement basis are being returned herewith.

Exhibit 12

The position of this company, who are Agents for the Wallenius Line which carries as part of their cargo considerable numbers of automobiles is that, we complied with rules set down by the Pacific Maritime Association Bulletin No. 4 dated January 17, 1961.

Paragraph one (1) of this bulletin stated that cargo shall be reported at 27½ cents per ton as manifested. Each automobile carried on the Wallenius Line is considered as one (1) unit, and further to substantiate this in our contract with you, each automobile is considered as one unit and/or one (1) ton. Further we refer to paragraph six (6) of this same bulletin stating in part, tonnage declaration made by companies are to be the same as during the year 1959. This reporting of automobiles as one (1) unit, and/or one (1) ton was thusly reported in this manner in 1959.

Do to the above, we are requesting that you report to the Pacific Maritime Association Mechanization Modernization Fund exactly as was done in 1959.

[2] We trust that the above clarifies our position in relation to the reporting of automobile assessments.

Very truly yours,

WATERMAN CORP. OF CALIFORNIA
AGENTS FOR WALLENIUS LINE

H. J. Murphy,
H. J. MURPHY,
Operating Manager.

HJM/vc

Exhibit 13

[1] MARINE TERMINALS CORPORATION

Cable Address "Marineterm"

Contracting Stevedores & Terminal Operators

May 1, 1961

Mr. K. F. Saysette, Vice President & Treasurer
Pacific Maritime Association,
16 California Street
San Francisco 11, California

Mechanization & Improvement Fund

Dear Mr. Saysette:

Receipt is acknowledged of your letter dated April 28th demanding payment for the Mechanization & Improvement Fund contributions on foreign cars handled by this company from the inception of the plan.

In discussing the subject on the telephone, you explained that the Pacific Maritime Association was aware of what was behind our not making certain payments into the plan, but nevertheless, you had to protect yourself by writing the letters referred to above.

Mr. Ernst has this date again confirmed that the Pacific Maritime Association requested Marine Terminals Corporation not to file a suit against our principals for non payment until such time as a collective bargaining agreement is signed by the I.L.W.U. which would obligate Marine Terminals Corporation to pay the assessment. It is our understanding that without such an agreement we would stand a good chance of losing the case and jeopardizing the entire program.

Under the circumstances, Marine Terminals Corporation agreed not to file suit providing the Pacific Maritime Asso-

ciation did not press Marine Terminals Corporation for payment on the disputed portion of the Mechanization and Improvement Fund payments on foreign cars.

Please confirm that the above is your understanding of the situation.

Very truly yours,

MARINE TERMINALS CORPORATION,

C. R. Redlich,
C. R. REDLICH,
Vice President.

CRR:mb

Exhibit 14

[1] MARINE TERMINALS CORPORATION
OF LOS ANGELES

CONTRACTING STEVEDORES AND TERMINAL OPERATORS

P. O. Box 1068
Long Beach, California
HEmlock 2-5904
May 1, 1961

Mr. K. F. Saysette, Vice President & Treasurer
Pacific Maritime Association
16 California Street
San Francisco 11, California

Mechanization & Improvement Fund

Dear Mr. Saysette:

Receipt is acknowledged of your letter dated April 28th demanding payment for the Mechanization & Improvement Fund contributions on foreign cars handled by this company from the inception of the plan.

Exhibit 14

In discussing the subject on the telephone, you explained that the Pacific Maritime Association was aware of what was behind our not making certain payments into the plan, but nevertheless, you had to protect yourself by writing the letters referred to above.

Mr. Ernst has this date again confirmed that the Pacific Maritime Association requested Marine Terminals Corporation not to file a suit against our principals for non payment until such time as a collective bargaining agreement is signed by the I. L. W. U. which would obligate Marine Terminals Corporation to pay the assessment. It is our understanding that without such an agreement we would stand a good chance of losing the case and jeopardizing the entire program.

Under the circumstances, Marine Terminals Corporation agreed not to file suit providing the Paeific Maritime Association did not press Marine Terminals Corporation for payment on the disputed portion of the Mechanization & Improvement Fund payments on foreign cars.

Please confirm that the above is your understanding of the situation.

Very truly yours,

MARINE TERMINALS CORPORATION
(of Los Angeles)

/s/ C. R. REDLICH
C. R. Redlich
President

CRR;mb
cc: J. D. MacEvoy
C. W. Cartmel

Exhibit 20

[1] (Minutes of Committee on Work Improvement Fund Contribution Procedures, August 1, 1961)

A meeting of the Committee was held on August 1, 1961, in Room 201 of the Association Offices.

Those present were:
Committee Members:

Messrs. Peter N. Teige—American President Lines, Ltd.
Ian Back—Union Steamship Co. of N. Z.
O. I. M. Porton—Holland America Line
Hubert Brown—Pacific Far East Line, Inc.
B. M. Frochen—States Steamship Co.
Foster Weldon—Matson Navigation Co.

Staff Present:
Mr. K. F. Saysette

Committee Members Absent:

Messrs. L. R. Richards—Overseas Shipping Co.
W. B. Adams—Pope & Talbot, Inc.

The meeting convened at 10:00 A.M.
St. Sure Letter to Committee of July 17, 1961:

The Commiteee took up Mr. St. Sure's letter to the Chairman of the Committee dated July 17, 1961.

The first matter discussed was Item 3 of the letter that asked that the Committee investigate and make recommendations with regard to the refusal of certain members to pay the M & I Fund assessment. After a discussion of

the extent of the problem, the Committee recommended that the following action be taken:

1. That the PMA staff prepare a detailed report showing:

(a) The name of delinquent employers;

(b) The amount delinquent over thirty days; and

(c) Remarks concerning the reason for delinquency.

It was urged that the report be prepared promptly so that the Committee and the Board could know precisely the extent of the delinquency problem.

[2] 2. That the Board of Directors inaugurate a new policy whereby:

(a) Amounts due the M & I Fund which have not been paid after thirty days from the end of the month in which they accrued shall at that time be deemed delinquent and such employers shall be charged a penalty on the amount delinquent at the rate of one per cent per month, or any portion of a month, commencing at the date of delinquency;

(b) A report showing the names of delinquent employers and the amount of delinquency would be distributed to the membership if the employer has amounts still delinquent thirty days after the date of original delinquency.

The Committee considered Item 4 of Mr. St. Sure's July 17 letter which asked the Committee's advice on the employment of certified public accountants to check tonnage declarations made in connection with the Fund assessment. Mr. Saysette reported that Price Waterhouse & Co. esti-

mated they could check an average employer for about $300. The Committee agreed to recommend to the Board of Directors that Price Waterhouse & Co. conduct a spot-check of tonnage declarations by investigating the declarations of approximately fifteen employers a year, subject to holding the total expenditure for the year to $5,000 or less. Since the assessment program is a new one, it might be well to have the spot-checks for this year made as soon as possible.

Discussion of the inquiry in Mr. St. Sure's letter concerning a request for use by a non-member of the Central Records Office was postponed to a subsequent meeting since it is involved in the larger non-member problem confronting the Committee.

[3] *Volkswagen Assessment*:

Mr. Saysette reported on the continuing complaints of contractors who have handled Volkswagen and other foreign car shipments with respect to the application of the Fund assessment to such shipments and their failure to pay assessments on same. The Committee recommended that Mr. Saysette take up with Mr. Ernst the question of whether the assessment of automobiles on a measurement basis, though freighted on a unit basis, is legally appropriate.

MILITARY CARGO ASSESSMENTS:

The Committee next discussed the decision it had made earlier with respect to assessments on employers handling military cargo and particularly the Committee's decision with respect to a formula for conex containers, reflected in Mr. Saysette's letter to the Commanding General, U. S. Army Transportation Terminal Command, Pacific, of June 5, 1961. The Committee recommended that the military assessment principles which it had recommended be for-

mally approved and ratified by the Board of Directors, including the formula proposed with respect to measurement of conex cargo.

The Committee also dealt with the occasional military shipment moving over the terminals of steamship operators and recommended to Mr. Saysette that, after the above recommended Board action on the military cargo formula has been taken, a PMA directive be issued to the U.S.-flag lines handling military cargo, explaining that conexes moving over their terminals would be assessed according to the formula described in Mr. Saysette's June 5 letter.

[4] ADEQUACY OF PRESENT LEVEL ASSESSMENT:

The Committee then asked Mr. Saysette to report on the adequacy of the present assessment. He stated that as of June 30 the Fund appeared to be some $500,000 behind for the year 1961 based on tonnages handled to June 30th, but that there is usually a greater amount of cargo handled in the last months of the year and it was hoped that this $500,000 deficit would be largely made up. After a full discussion of this subject, it was recommended that the PMA staff establish a permanent system for periodic forecasting of the adequacy of the Fund assessments. This would involve analyzing past tonnage patterns, studying past errors in tonnage predictions, checking with operators to determine their short-range future tonnage expectations and the like. In this manner the assessment for each six months' period could be more nearly appropriate to the tonnage handled in that period, thereby avoiding the discrimination that would arise by requiring substantial increases in assessments in order to make up past deficits.

NON-MEMBER AND ASSESSMENT ESCAPE PROBLEM:

The Committee had, at its previous meeting, considered (1) the problem of obtaining assessment support for the

Exhibit 21

Fund from non-members and (2) whether there are any significant users of longshore labor who are benefiting from the M & I Agreement but are not contributing to the Fund because of the present plan of assessing only tonnage ultimately loaded to or discharged from vessels.

On the first problem Mr. Saysette reported that the ILWU had informally indicated that they would require all employers not members of PMA to pay the assessment. What was not indicated was whether the payments would be credited to the PMA Fund.

[5] On the second problem the staff was requested to study the matter and report to the Committee on the extent to which longshore labor is being used that escapes assessment entirely. A quantitative estimate will enable the Committee to appraise better the seriousness of the problem. Mr. Saysette said he would also explore the details of some situations in the Northwest which had been mentioned in this connection by Mr. Brown.

The meeting adjourned at 12 Noon.

(for) PETER N. TEIGE, Chairman

Exhibit 21

[1] August 15, 1961

MEMORANDUM FOR B. H. GOODENOUGH:

MECHANIZATION FUND

In accordance with your request of last week, based on discussions held by the Coast Steering Committee at the Villa Hotel several weeks ago, the following represents current information on mechanization fund contributions.

Exhibit 21

Non-Members

Attached is copy of my letter of August 3, 1961, addressed to Mr. Bodine of the ILWU, calling his attention to the non-member problem and asking for ILWU cooperation in seeing that such companies as National Motels pay contributions to the mechanization fund in exactly the same manner as member companies. Mr. Bodine assured me verbally prior to the writing of my letter they would do everything possible to see that non-members are not placed in the position where they have a competitive advantage over member companies.

Coastwise Lumber

W. R. Chamberlin & Co., a member of the Association, has not been making any contributions to the mechanization fund. They state they will not make any contributions until the question of contribution by Oliver J. Olson & Co. and Sause Bros. has been determined. Oliver J. Olson and Sause are non-members and according to Mr. Bodine no arrangement has been made with these companies for a contribution to the Mechanization Fund. Conversations with respresentatives of Sause and W. R. Chamberlin have been to the effect that a contribution of 13¾¢ per thousand feet of lumber loaded aboard a ship or barge, and a 13¾¢ contribution for the discharging operation would put the coastwise lumber industry out of business. Some determination will have to be made regarding such coastwise lumber tonnages.

Delinquencies

Attached is a 4-page memorandum compiled by the Accounting Department concerning delinquent assessments. The memorandum, as you will note, has been broken down into delinquencies on Government Cargoes, Automobiles, and Regular Commercial Cargoes.

Exhibit 21

The Army in San Francisco, and the Navy in Seattle are now in the process of compiling their tonnages on which mechanization contributions may be due. The Army in San Francisco has indicated through their Contractors, commencing with the month of July contributions will be made currently and as fast as the figures can be accumulated, the contributions for the retroactive period from January 16 thru June 30 will be computed and remittance made thru the Contractors.

[2] Rothschild in Seattle informed me by phone they are just about in the position of completing an agreement with the Navy whereby the Navy will remit to the mechanization fund on a revenue ton basis. We are unable to determine the amount due from Rothschild by reason of the fact they have not submitted any tonnage information whatsoever, and we have coming from Rothschild not only mechanization assessments, but PMA dues as well on such Navy cargoes.

The question of contributions on foreign cars is one which has been under discussion for several months, particularly on account of the position taken by the Volkswagen shippers, who feel they should not pay on a measurement ton basis, but rather on a weight ton. This particular question is one which may well require the help of counsel.

Commercial cargo delinquencies apparently are confined to W. J. Jones & Son and Brady Hamilton Stevedore Co. in Portland, and Rothschild International Stevedoring Co. in Seattle. These particular companies have apparently taken the position they will not pay the Association until they themselves are reimbursed by their non-member principals. Several months sometimes elapses before we secure the contribution on such tonnages in spite of the fact we have repeatedly sent letters to such companies, and in most instances have never received a reply.

Exhibit 21

Recommendations of the Funding Committee

The Funding Committee met in the Association offices to discuss not only the subjects already mentioned in this memorandum, but several other items as well. They are as follows:

1) The Committee requested the names of delinquent employers and the amount of delinquencies over 30 days, as well as remarks concerning them. This information has already been furnished to the Committee.

2) It was recommended that the Board of Directors inaugurate a new policy whereby amounts due the M & I Fund which have not been paid after 30 days from the end of the month in which they accrued shall at that time be deemed delinquent and such employers shall be charged liquidating damages, including interest on the amount delinquent at the rate of 1 per cent per month, or any portion of a month, commencing at the date of delinquency.

3) The Committee recommended that a report showing the names of delinquent employers and the amount of delinquency be distributed to the membership if the employer has amounts still delinquent 30 days after the date of original delinquency.

[3] 4) The Committee recommended to the Board of Directors that Price Waterhouse & Co. conduct a spot-check of tonnage declarations by investigating the declarations of approximately 15 employers a year, subject to holding the total expenditure for the year to $5,000 or less. Price Waterhouse & Co. had indicated they could check an average employer for about $300. The Committee further recommended

that it might be well to have the spot-checks for this year made as soon as possible.

5) The Committee recommended staff establish a permanent system for periodic forecasting of the adequacy of the Fund assessments. This would involve analyzing past tonnage patterns, studying past errors in tonnage predictions, checking with operators to determine their short-range future tonnage expectations and the like. In this manner the assessment for each six months' period could be more nearly appropriate to the tonnage handled in that period, thereby avoiding the discrimination that would arise by requiring substantial increases in assessments in order to make up past deficits.

Based on contributions received or receivable for the first six months of 1961, it would appear that the Fund will be $500,000 short of attaining its obligation by December 31, 1961; $200,000 of this amount could be attributed to the fact contribution did not become effective until January 16, 1961, and the first 15 days of January would have to be made up. The balance does not take into consideration the fact that ordinarily shipping increases the last six months of the year as compared with the first six months. A quick check with several companies, including the Army Contractors, indicates commercial cargoes should increase at least 10 per cent during the last six months of the year as compared with the first six months; whereas, in the case of the Army, the percentage of increase will be even greater. We are writing approximately 25 American and Foreign Flag member companies on the Pacific Coast to furnish us information periodically as to what their forecasts might be as to increase or decrease in tonnage volume during a given period of time.

Exhibit 22

A copy of the minutes of the meeting of August 1, 1961 is also attached to this memorandum, and reports on certain other points not otherwise contained in this memorandum.

K. F. SAYETTE

KFS:IM
Attachments
cc: J. Paul St. Sure
w/attachments

Exhibit 22

[1] CONFIDENTIAL
MEMORANDUM October 24, 1961
TO: J. Paul St. Sure
FROM: P. Lancaster
RE: Marine Terminals and Mechanization Fund Contributions on Volkswagens

1. The Volkswagen firm has refused to pay Mechanization Fund contributions on Volkswagens stevedored by Marine Terminals (and in the Northwest by Seattle Stevedoring and Brady-Hamilton). The Volkswagen people object to the measurement ton basis of contribution which costs *$2.76* per vehicle vs. a weight ton cost of *28¢* per vehicle and a long-shore labor cost of *$10.45* per vehicle.

2. We are informed that Marine Terminals has a private contract with Volkswagen guaranteeing payment of the tonnage contributions to Marine Terminals. In order to enforce this private contract and pay to PMA the contributions which it acknowledges as an obligation under the Mechanization Fund (now about $35,000), Marine Terminals now proposes to (a) sue the Volkswagen people for it or (b) attempt to force payment by refusing to work the next ship unless payment is made. They tell us, how-

ever, that the probable consequences of suing or attempting to force payment will be:

(1) Immediate filing by Volkswagen of a petition with the Federal Maritime Board that the Mechanization Fund Agreement violates Section 15 of the Shipping Act of 1916.

We are informed that the petition has already been prepared by the Volkswagen attorneys, Graham, James and Rolph.

(2) Volkswagen may transfer its business from Marine Terminals to another member company. They may do this to save face even though such other member company may require tonnage contributions under the contract offered by it to Volkswagen.

(3) Volkswagen, who is presently prepared to do so, may establish its own stevedoring company outside the Association, either subcontracting supervision and gear from a member company or going whole hog and establishing a complete company.

[2] 3. The consequences of such actions by the Volkswagen firm would be:

(1) The Lillick office says that the petition to the Federal Maritime Board is without merit. It would help if our present in-the-works reply to the Federal Maritime Board were filed before the threatened petition were filed, but it is not essential. The prospect of a Volkswagen petition would seem to be provoking the interest of other companies, including steamship operators, who are restive under the Mechanization Agreement.

(2) The transfer of business from one member to another would, of course, be divisive within the

Association, and is an occurrence which should not stem from the Mechanization Agreement. However, such division is not within the ambit of the Association operations under its By-Laws.

The Association is almost certainly barred from taking any action in this matter since such would probably be an anti-trust violation.

(3) The creation of a new stevedoring firm outside the Association would leave the responsibility for setting, collecting, and policing contributions entirely to the ILWU. If such a new firm seems to develop any advantages over Association members, the barn door is open and the fat is in the fire. Some people would hold that merely being out from under the Mechanization Agreement would be an advantage in itself. The Lillick office says that imposing Mechanization Fund contributions on such an outsider has very delicate anti-trust implications, and the Association would have to be very careful of all it did in connection with such a situation. Specifically, the Association could refuse to agree to payments into the fund if they were not comparable to tonnage contributions but otherwise the Association is confined to leaving the matter in ILWU hands and must not be a party to coercing contributions.

(4) If Marine Terminals sues Volkswagen, other shippers similar to Volkswagen may withhold contributions pending the outcome of the suit. This might even include the Army, since they are still querulous about the propriety of such contributions. An open issue of Shipping Act legality might be the jumping off point for further Army resistance.

Exhibit 25

[1] MARINE TERMINALS CORPORATION
Contracting Stevedores & Terminal Operators

November 29, 1961

Mr. Peter N. Teige
Chairman, P. M. A. Mechanization Funding Committee
Pacific Maritime Association
16 California Street
San Francisco, California

Dear Mr. Teige:

We wish to refer to the meeting of last Friday, November 14, 1961, with your committee, the agents and principals of Volkswagen and their present stevedore contractors.

During this meeting there definitely was established by your committee an attempt to relieve our association from any responsibility to the extent that they are leaving the direct employers entirely free to absorb assessments if they so desire. We hope that we conveyed to you that the assessment in question represents approximately a 33⅓% increase on our handling rate. There is no way that the contractor could absorb such an increase as we have benefited nothing before or since the Mechanization & Improvement Fund has been established.

The present assessed rate on automobiles is not based on practical conditions and has no comparison to other commodity assessments.

We recommend and request at your next meeting that changes in this assessment be made along the lines of Mr. Klaff's request.

Very truly yours,

ELLET G. HORSMAN,
Vice President.

EGH:mb

Exhibit 26

[1] WINCHESTER AGENCIES, INC.
Steamship Agents and Brokers

November 29, 1961

Mr. Peter N. Teige
Chairman, P.M.A. Mechanization Funding Committee
Pacific Maritime Association
16 California Street
San Francisco, California

Dear Mr. Teige:

We wish to thank you and your associates on the P.M.A. Mechanization Funding Committee for making yourselves available to meet with us last Friday. It is our understanding that, in the near future, your Committee will be considering our objections to the Work Improvement Fund assessment of 27½ cents per ton on a measurement ton basis against unboxed automobiles handled at United States Pacific Coast Ports. We believe that it may be mutually helpful to have a brief recapitulation of our position in writing.

Ever since Volkswagens were first shipped to the Pacific Coast in 1954, they have been freighted on a unit basis, or on lumpsum FIO or time charter. Other than those full cargo charter vessel shipments, not only freight but also terminal services including stevedoring, have always been computed and paid at so much per unit. However, we understand that in other trades unboxed automobiles are freighted sometimes on a weight basis, sometimes on a measurement basis, but also frequently on a unit basis. And, in the past, the computation and payment of cargo dues owed to your Association in respect of unboxed automobiles has been made on all three basis: By unit, by weight and by measurement ton.

Exhibit 26

In January of 1961, your Committee determined that the required contributions to make up the Work Improvement Fund by P.M.A. members, including the terminal operators who handle our Volkswagens, would comprise an assessment of 27½ cents a ton on "general cargo", 27½ cents a thousand board feet on lumber and 5½ cents a ton on bulk cargo. The assessment on "general cargo" was to be computed on the basis of weight or measurement tons depending upon whether the particular cargo had been manifested as weight or measurement cargo in 1959. Thereafter, it was determined to compute the assessment on unboxed automobiles on a measurement ton basis, regardless of the fact that Volkswagens in the Europe to Pacific trade, and all unboxed autos in the Intercoastal and Pacific Coast to Hawaii trade had never been so manifested.

[2] As we have already informed you, the result of this assessment on a measurement ton basis will be to increase the discharging costs of Volkswagens approximately 22% in the case of sedans and 31% in the case of transporters. In contrast, we estimate the average increase in the discharging costs of packaged general cargo resulting from this assessment to be approximately 2.2%. The injustice of a measurement ton assessment against unboxed autos is accentuated by the fact that the man-hours necessarily employed in their handling always have been less than practically any other commodity. This situation results directly from the "unitized" nature of unboxed autos. It is our position that this disproportionate increase in the cost of discharging Volkswagens and other unboxed automobiles subjects that description of traffic to undue and unreasonable prejudice and disadvantage in violation of Section 16 (First) of the Shipping Act, 1916. Furthermore, this prejudicial assessment results from the contrary of the just and reasonable regulations and practices relating to the handling, storing and delivery of property which are required of all persons subject to the same Act by Section

Exhibit 26

17. In our opinion there is no question but that the terminal operators who are demanding payment of this assessment from us directly, as well as your Association, which has compelled them of necessity to this by its unjust and unreasonable regulations, are subject to Sections 16 and 17 of the Shipping Act, 1916.

It is our impression from our meeting with your Committee that at least some of its members recognize that the over-simplification of your assessment necessarily results in prejudice to certain classes of cargo. We appreciate your desire to keep the assessment as simple as possible but we must point out that regardless of the merit of such simplicity it does not provide justification for a failure to observe the just and reasonable regulations and practices required by law.

Before closing, we have two suggestions to make, viz:

1. If your Association maintains its present approach to the funding of this program, we submit that it is only equitable that unboxed autos be assessed on the basis upon which they are normally handled between factory, loading terminal, ship's hold, discharge terminal, distributor, dealer, retail buyer—namely, per unit. This is comparable to the treatment which your Association has applied in a "per thousand board feet" application to lumber. (Automobiles are factory assembled as units to assure reliability of performance and ready use in the retail market, and not to reduce transportation costs; in fact, if shipped in disassembled form, the transport cubic measurement of a Volkswagen auto would be substantially less than its assembled unit measurement.) In any case, we urge that the assessment levied against all commodities, including unboxed autos, be such as to result in approximately equal percentage of cargo-handling costs.

[3] 2. While we believe that an assessment per unit could be equitably established for unboxed automobiles as expressed above, we alternatively suggest that the assess-

ment on all commodities except bulk cargo be made on the basis of:

a) Fixed percentage of total cargo-handling expenses on board, alongside and in the terminal (plus fixed allowance for usage of specific cargo-handling equipment); or

b) Fixed percentage of the total manifest freight.

We shall appreciate your acquainting the other members of your Committee with the contents of this letter. We thank you for your consideration and look forward to hearing from you in due course.

Very truly yours,

WINCHESTER AGENCIES, INC.,
PETER CURTIS

PC:mt

cc: Mr. J. Paul St. Sure, President
Pacific Maritime Association

cc: Mr. P. Lancaster, Secretary
P.M.A. Mechanization Funding Committee

cc: Mr. F. Klaffs, Volkswagenwerk, A.G.
Shipping Department, Wolfsburg

cc: Graham, James & Rolph
Attention: Mr. A. D. Calhoun, Jr.

(Exh. 28, 1)

Exhibit 28

[1] February 8, 1962

M & M FUND

MEMO ON PROPOSED FIVE TO ONE MAXIMUM LIMITATION ON ASSESSABLE TONNAGE FOR AUTOMOBILES

Total automobile measurement tonnage handled in 1961, based on actual declarations for ten months and estimated tonnage for two months 1,173,242 tons

@ the current asessment rate of 24½¢ per ton $287,444.00

Assuming nine to one to be a reasonably average cubic to weight ratio, the imposition of a five to one limitation would reduce the contributions on autos by 44.4% or $127,625.00 leaving this amount to be made up in some other manner. If an across-the-board rate adjustment were used to recoup the deficit, an estimated 2.6% increase would be required.

C. J. MYERS

Exhibit 29

[1] February 20, 1962

MEMORANDUM FOR J. PAUL ST. SURE:

VOLKSWAGENS

Several days ago Curt Myers and I had a conference with Edward Ransom and Gary Torro of Lillick's office, at which time we discussed various ways of collecting monies due from contracting stevedores for handling Volkswagens by the particular contractors. The contributions I specifically refer to represent monies due the Modernization and Mechanization Fund.

Mr. Ransom summarized in very concise form the various problems we would be faced with in the event suit was instituted. It will be gathered from this memo the situation is complex, and depending upon the action taken, may involve us not only with the contracting stevedores but with the Maritime Administration.

The method which may be chosen to effectuate collection of these delinquent M & M contributions is, I believe, a policy question; consequently, the matter is being referred to you for your consideration.

I might further add that Peter Teige of the Modernization and Mechanization Committee has asked for a meeting of the committee to be held on Wednesday afternoon, February 21st, to discuss a theory which he has regarding the reduction of assessments on automobiles to a lesser amount. For your ready reference a copy of the memo which was sent to the Funding Committee dated February 8, is attached for your information.

K. F. SAYSETTE

KFS:IM
Attachment
cc: C. J. Myers

Exhibit 31

[1] MEMORANDUM March 27, 1962

TO: J. Paul St. Sure and Ben Goodenough

FROM: Pres Lancaster

SUBJECT: Mechanization Fund Assessments—Marine Terminals and Volkswagen

It was agreed this morning by the Coast Steering Committee that:

1) In order to satisfy a previous commitment, staff should write a letter to Marine Terminals (or Volkswagen) advising them that the Funding Committee had again reconsidered the Mechanization Fund assessment on unboxed automobiles and did not recommend any change in the present assessment. Further, the Funding Committee did not expect that there would, in the near future, be any change in the over-all assessment method which would change the assessments on this class of commodity.

2) The Coast Steering Committee recommends to the PMA Board of Directors that the action of the Board of December 13, 1961, by which PMA offered legal aid and assistance to Marine Terminals in obtaining payment from Volkswagen be reviewed and clarified. The Coast Steering Committee recommends to the Board that PMA counsel assist Marine Terminals only if any action by or against Marine Terminals raises issues which jeopardize the Mechanization Plan or other interests of the industry, in which case PMA counsel is authorized to intervene and, if necessary, assume responsibility for handling that portion of the action involving such issues. Except in such circumstances, neither PMA nor its counsel is to be involved in

any action by Marine Terminals against Volkswagen. If PMA counsel acts in such circumstances, PMA reserves the right to institute action against Marine Terminals if Marine Terminals is itself still in default of Mechanization Fund Assessments, incuding those due on the Volkswagen account.

3) In light of the above, PMA advises Marine Terminals, and all other companies owing assessments on Volkswagen, that such assessments are due, and that these companies should take such action as they deem necessary to obtain payment from their principals.

It should be noted that counsel has pointed out that cumulative defaults, both on the account of companies handling Volkswagen business and on the account of companies handling Army cargo, tend to create a situation in which it can be held that the circumstances of the IRS ruling no longer govern because the "reasonable" relationship between contributions and benefits paid to beneficiaries has been distorted from one tax year to the next.

PL/ns

cc: K. F. Saysette

Exhibit 32

[1] McCutchen, Doyle, Brown & Enersen
Counselors at Law
601 California Street
San Francisco 8, California

December 10, 1962

Deliver
Marine Terminals Corporation
261 Steuart Street
San Francisco 5, California

PMA Mechanization Fund Assessments

Dear Sirs:

As requested, we are writing to provide a brief outline of the background and status of the controversy relating to the Mechanization Fund assessments on Volkswagen autos.

Effective January 1, 1961 PMA and ILWU entered into a Supplemental Agreement on Mechanization and Modernization, calling for the creation of a special fund for longshoremen. It was left up to PMA to determine how contributions would be made to the Fund. In due course it was determined by PMA that stevedore and terminal companies should contribute to the Fund certain amounts with respect to each ton of cargo handled. It was contemplated that these assessments, as added stevedoring or terminal costs, could be added to the charges of the stevedore or terminal companies.

Whether the assessments were to be levied according to measurement tons or weight tons depended, in general, upon the basis used for calculating the ocean freight. At the outset, there was uncertainty as to whether shippers of autos would, in effect, be given an option to have assessments on a weight-ton basis by the device of having the ocean freight

calculated on that basis. For various reasons, it was determined that all automobiles should be assessed on a measurement-ton basis. Volkswagenwerk vigorously objected to this method [2] of assessment, contending that it discriminated against autos and resulted in a payment which was out of proportion to benefits received. After a good deal of controversy and negotiation, both before and after the Agreement went into effect, PMA decided to adhere to a uniform assessment on a measurement-ton basis.

Volkswagenwerk refused to pay the assessment on this basis, whether billed as part of the basic stevedoring charge or billed separately. It specifically refused to agree to a new commodity rate which would include the assessment. Its position was that if stevedoring services were billed on a commodity rate basis, the amount of the assessment would be deducted and only the balance paid. Because of Volkswagenwerk's adamant position, Marine Terminals has continued to bill the Mechanization Fund assessments separately. Volkswagenwerk has continued to refuse payment of these assessments.

Not only has Volkswagenwerk refused to pay the assessment, it has refused also to post any security to cover any amount of assessments which might ultimately be held to be due. Because of this refusal, PMA filed suit against Marine Terminals in the United States District Court to recover the amounts of the assessments and Marine Terminals, in turn, impleaded Volkswagenwerk as the party ultimately liable.

As expected, Volkswagenwerk answered the suit by contending that the assessments were illegal under the Shipping Act. It asked that the suit be stayed to permit proceedings before the Federal Maritime Commission to determine the legality of the assessments. As we reported to you recently, the District Court granted Volkswagenwerk's request for a stay, on condition that proceedings be com-

Exhibit 35

menced before the Federal Maritime Commission by December 29. The Court refused to consider our contention that the Commission has no jurisdiction.

While it is difficult to predict how long proceedings before the Commission might take, it might well require a year or more to obtain a ruling. Additional time might be required if the losing party should appeal from the Commission's decision.

Very truly yours,

McCutchen, Doyle, Brown & Enersen
By Bryant K. Zimmerman

2 cc encl.

Exhibit 35

[1] Pacific Maritime Association
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

January 17, 1961

To Members:

Mechanization and Modernization Fund

At a meeting of the Board of Directors held on Monday, January 16, 1961, on problems relating to the recently ratified agreement with the ILWU setting up a Mechanization and Modernization Fund, the following items were approved:

1) Contribution rate on General Cargo will be 27½¢ per ton, as manifested with 2000 pounds weight, 40 cubic feet measurement and 1000 board feet of lumber constituting a ton. This is comparable to

reporting presently being made by members for PMA tonnage dues purposes.

2) Contribution rate on Bulk Cargo will be 5½¢ per ton, with bulk cargo being defined as a commodity which by nature of its unsegregated mass is usually handled by shovels, scoops, buckets, forks or mechanical conveyors and is loaded or unloaded and carried without wrapper or container and received and delivered by carriers without transportation mark, or count.

3) Scrap metal, such as scrap iron, pig iron and steel shavings—5½¢ per ton when handled on an unpackaged basis by shovels, scoops, buckets, forks, magnets or mechanical conveyor *and not in containers* which are loaded or unloaded and carried without wrapper or container and without transportation mark, or count.

4) Effective date of contribution is January 16, 1961 on all vessels which have commenced loading or discharging cargoes in a particular port on and after that date. Any operation which started in a port prior to January 16, 1961 will not be affected by the Mechanization contribution.

5) Coastwise and transshipped cargoes will carry the full contribution rate for mechanization purposes.

6) Tonnage declarations by companies are to be made in exactly the same manner as manifested and reported to the Association for dues purposes during the year 1959 (excepting scrap iron and pig iron) and any changed method of manifesting from that date will not be valid for reporting tonnages covering Mechanization Fund contributions.

Exhibit 35

7) Declarations of tonnages will be made, as in the past, by member steamship companies and contracting stevedores reporting for non-member companies and government agencies, being made in exactly the same manner by such companies as PMA dues. Mechanization contributions are part of a labor contract, and it is essential Reports of Tonnages and a check for contributions be in the Association's hands *not later than the 20th of the month following the month in which such cargoes are handled.*

[2] 8) The Directors have agreed the Association may employ certified public accountants to check tonnage declarations made by companies to substantiate such declarations and contributions paid.

9) The Directors further agreed a committee is to be appointed to evaluate the reporting and assessment program with a report to be submitted to the Directors 30 days prior to the expiration of the six months' trial period of assessment procedures voted by the Directors and Membership.

The declaration form presently used for reporting tonnages to the Association for dues purposes will also be utilized for the Mechanization and Modernization program. Association staff is presently working on a remittance advice for payment of mechanization contributions which will utilize information on the tonnage declaration on a recapitulation basis to compute the amounts due the Mechanization Fund. This form, with instructions, should be in your hands not later than the first of February and in sufficient time to report January tonnage and pay contributions.

K. F. Saysette
Vice President & Treasurer

KFS:IM

Exhibit 36

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
San Francisco, Calif.

February 3, 1961

MEMBERS:

CARGO DUES—TONNAGE—AUTOMOBILES

Our letter of January 16, 1958 stated automobiles should be reported to the Association on a measurement basis to tonnage dues purposes. We indicated that if a steamship company or contracting stevedore was reporting automobiles, or any other cargo, using weight when measurement should have been used, a supplementary tonnage report should be submitted promptly to the Association adjusting such errors, together with a check to cover the additional amount of dues involved.

Since the institution of the Modernization and Improvement Fund, it has come to our attention a number of contracting stevedores and steamship companies are still reporting automobiles for tonnage dues purposes on a weight basis instead of measurement. The theory of dues and assessments is predicated on the fact member companies shall pay on exactly the same basis thereby assuring all companies each is paying its fair share of a dues or assessment program.

Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form indicating by vessel and date the tonnage on automobiles reported on a weight basis, the tonnage which should have been reported on a measurement basis, and the difference which is assessable at 2½ cents per ton. This statement should be com-

pleted as promptly as possible and sent to the Association with a check to cover the amount of additional dues involved. Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis.

A report no doubt will have to be made to the Board of Directors regarding status of tonnage dues on automobiles in the very near future covering the period January 1958 to the present time.

K. F. SAYSETTE,
Vice President & Treasurer

KFS:IM

Exhibit 39

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

February 9, 1960

TO BOARD OF DIRECTORS:

CERTIFICATION OF 1959 TONNAGE AND AVERAGE MONTHLY SEAGOING PERSONNEL FOR QUARTER ENDING DECEMBER 31, 1959 FOR VOTING PURPOSES

1960

Article VI, Section 2 of the Association By-Laws requires the Secretary to certify to the Board of Directors the tonnage of cargo loaded and/or discharged by or for each member during the preceding calendar year. The Section also requires the Secretary to report the average number of seagoing employees employed by members of the Passenger Line Group, Coastwise Group, Alaska Group,

Exhibit 39

Intercoastal Line Group and Offshore Group, during the preceding quarter. These employees work under collective bargaining contracts executed by the Association on behalf of members in the above groups. There is submitted for your consideration a listing of members and the tonnage and average number of seagoing employees reported by them as recorded in the financial records of the Association.

Opposite each member is listed the number of votes based on tonnage and seagoing employees as provided in the By-Laws; i.e., one vote for each member and, in addition, one vote for each full 100,000 tons and one vote for each full 100 seagoing employees.

Respectfully submitted,

PACIFIC MARITIME ASSOCIATION
J. A. ROBERTSON
Secretary

JAR:vs
Attach.

(Attached to Exhibit 39)

[1] PACIFIC MARITIME ASSOCIATION

Voting Strength

Based of 1959 Tonnage and Average Seagoing Personnel
For the Quarter Ending December 31, 1959

	Company	Tonnage	Personnel	Votes
1.	Alaska Steamship Company	390,866	366	7
2.	Alaska Teminal & Steve. Co.	—	—	1
3.	Albin Stevedore Co.	5,901	—	1
4.	Albina Dock Co.	—	—	1
5.	American-Hawaiian Steamship Co.	—	—	1
6.	American Mail Line	397,105	449	8
7.	American President Lines	563,025	2,113	27
8.	Anacortes Stevedoring Co., Inc.	2,928	—	1
9.	Associated-Banning	281,070	—	3
10.	Balfour, Guthrie & Co., Ltd.	730,599	—	8
11.	Barber Steamship Lines, Inc.	36,957	—	1
12.	Bellingham Steve. Co.	18,851	—	1
13.	The Blue Star Line, Inc.	110,400	—	2
14.	Brady-Hamilton Stevedore Co.	1,134,189	—	12
15.	Bulk Handlers, Inc.	—	—	1
16.	California Stevedore & Ballast Co.	1,162,149	—	13
17.	Canadian Gulf Line, Ltd.	257,860	—	3
18.	W. R. Chamberlin & Co.	—	—	1
19.	Coast Stevedore Co.	—	—	1
20.	Coastwise Line	370,030	46	4
21.	Columbia Basin Terminals	—	—	1
22.	Consolidated Steve. Co.	2,963	—	1
[2] 23.	Crescent Wharf & Warehouse Co.	391,404	—	4
24.	The East Asiatic Co., Inc.	126,019	—	2
25.	Encinal Terminals	—	—	1
26.	Everett Stevedoring Co.	48,598	—	1
27.	Fern-Ville Lines	7,876	—	1
28.	French Line	290,609	—	3
29.	Furness, Withy & Co., Ltd.	315,996	—	4
30.	General Stevedore & Ballast Co.	49,679	—	1
31.	Grace Line Inc.	300,963	371	7
32.	Griffiths & Sprague Steve. Co.	175,693	—	2
33.	Holland-America Line	184,321	—	2

Exhibit 39

	Company	Tonnage	Personnel	Votes
34.	Howard Terminal	200,340	—	3
35.	Humboldt Stevedore Co., Ltd.	47,917	—	1
36.	Independent Stevedore Co.	222,058	—	3
37.	Indies Terminal Co.	—	—	1
38.	International Terminals, Inc.	—	—	1
39.	Interocean Line	284,373	—	3
40.	Interstate Carloading Co.	—	—	1
41.	Italian Line	129,660	—	2
42.	Johnson Line	318,122	—	4
43.	Jones Stevedoring Co.	1.545,641	—	16
44.	W. J. Jones & Son, Inc.	1,891,103	—	19
45.	Kerr Steamship Co., Inc.	267,061	—	3
46.	Klaveness Line	17,497	—	1
[3] 47.	Knutsen Line	109,851	—	2
48.	Lines Service Steve. Inc.	—	—	1
49.	Luckenbach Steamship Co., Inc.	916,175	78	10
50.	M & R Services, Inc.	—	—	1
51.	Maersk Line Agency	—	—	1
52.	Marine Terminals Corp.	304,815	—	4
53.	Marine Terminals Corp. of L. A.	402,229	—	5
54.	Matson Navigation Company	2,585,548	2,267	48
55.	Matson Terminals, Inc.	—	—	1
56.	Metropolitan Steve. Co.	711,503	—	8
57.	Mutual Stevedoring Co.	—	—	1
58.	Mutual Terminals, Inc.	—	—	1
59.	Oceanic Steamship Co.	—	—	1
60.	Ocean Terminals	—	—	1
61.	Fred. Olsen Line Agency, Ltd.	236,340	—	3
62.	Olympia Stevedoring Co.	9,306	—	1
63.	Olympic-Griffiths Lines, Inc.	321,764	—	4
64.	Olympic Peninsula Steve. Co.	28,456	—	1
65.	Olympic Steamship Co., Inc.	—	—	1
66.	Oregon Stevedoring Co., Inc.	129,725	—	2
67.	Outer Harbor Dock & Wharf, Inc.	48,566	—	1
68.	Overseas Shipping Co.	176,173	—	2
69.	Pacific Atlantic Steamship Co.	—	—	1
70.	Pacific Australia Direct Line	—	—	1
71.	Pacific Far East Line, Inc.	811,974	916	18
[4] 72.	Pacific Islands Transport Line	41,358	—	1
73.	Pacific Oriental Terminal	—	—	1
74.	Pacific Orient Express Line	104,529	—	2

Exhibit 39

	Company	Tonnage	Personnel	Votes
75.	Pacific Ports Service Co.	—	—	1
76.	Pacific Republics Line	207,141	377	6
77.	Panama Pacific Line	—	—	1
78.	Parr-Richmond Terminal Co.	197,688	—	2
79.	Pope & Talbot, Inc.	422,671	273	7
80.	Portland Stevedoring Co.	394,268	—	3
81.	Rothschild-International Steve. Co.	859,250	—	9
82.	Rothschild's Alaska Steve. Co., Inc.	69,831	—	1
83.	Royal Mail Lines, Ltd.	140,373	—	2
84.	Salmon Terminals	—	—	1
85.	The San Francisco Steve. Co.	65,998	—	1
86.	Schirmer Stevedore Co., Ltd.	128,559	—	2
87.	Seaboard Stevedoring Corp.	230,786	—	3
88.	Seattle Bulk Loading Terminal, Inc.	144,549	—	2
89.	Seattle Stevedore Co.	298,627	—	3
90.	Shaffer Terminals	—	—	1
91.	C. F. Sharp & Co., Inc.	—	—	1
92.	Star Terminal Co., Inc.	—	—	1
93.	States Marine Lines	445,646	—	5
94.	States Steamship Co.	503,726	653	12
95.	Tait Stevedoring Co., Inc.	97,046	—	1
96.	Transpacific Trans. Co.	498,245	—	5
[5] 97.	Twin Harbor Steve. & Tug Co.	76,246	—	1
98.	Union SS Co. of N. Z., Ltd.	16,355	—	1
99.	Washington Stevedoring Co.	25,194	—	1
100.	West Coast Steamship Co.	—	177	2
101.	West Coast Terminals Co. of Calif.	77,161	—	1
102.	Westfal-Larsen Co. Line	97,935	—	1
103.	Weyerhaeuser Steamship Co.	377,284	215	6
104.	Willapa Harbor Steve. Co.	22,450	—	1
105.	Williams, Dimond & Co.	—	—	1
106.	Yerba Buena Corp.	39,853	—	1
107.	Zidell Docks, Inc.	37,155	—	1
	Total	24,791,172	8,301	396

Exhibit 40

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

March 6, 1961

TO BOARD OF DIRECTORS:

CERTIFICATION OF 1960 TONNAGE AND AVERAGE MONTHLY SEAGOING PERSONNEL FOR QUARTER ENDING DECEMBER 31, 1960 FOR VOTING PURPOSES 1961

Article VI, Section 2 of the Association By-Laws requires the Secretary to certify to the Board of Directors the tonnage of cargo loaded and/or discharged by or for each member during the preceding calendar year. The Section also requires the Secretary to report the average number of seagoing employees employed by members of the Passenger Line Group, Coastwise Group, Alaska Group, Intercoastal Line Group and Offshore Group, during the preceding quarter. These employees work under collective bargaining contracts executed by the Association on behalf of members in the above groups. There is submitted for your consideration a listing of members and the tonnage and average number of seagoing employees reported by them as recorded in the financial records of the Association.

Opposite each member is listed the number of votes based on tonnage and seagoing employees as provided in the By-Laws; i.e., one vote for each member and, in addition, one vote for each full 100,000 tons and one vote for each full 100 seagoing employees.

Respectfully submitted,

PACIFIC MARITIME ASSOCIATION
J. A. ROBERTSON
Secretary

JAR:ah
Attachment

Exhibit 40

(Attached to Exhibit 40)

[1] PACIFIC MARITIME ASSOCIATION

Voting Strength

Based on 1960 Tonnage and Average Seagoing Personnel for the Quarter Ending December 31, 1960

	Company	Tonnage	Personnel	Votes
1.	Alaska Steamship Company	430,946	352	8
2.	Alaska Terminal & Steve. Co.	—	—	1
3.	Albin Stevedore Co.	8,352	—	1
4.	Albina Dock Co.	—	—	1
5.	American-Hawaiian SS Co.	—	—	1
6.	American Mail Line	498,293	423	9
7.	American President Lines	596,065	2,077	26
8.	Anacortes Stevedoring Co.	1,322	—	1
9.	Associated-Banning Co.	412,868	—	5
10.	Balfour, Guthrie & Co., Ltd.	752,100	—	8
11.	Barber Steamship Lines, Inc.	26,811	—	1
12.	Bellingham Steve. Co.	19,782	—	1
13.	The Blue Star Line, Inc.	127,863	—	2
14.	Brady-Hamilton Steve. Co.	1,316,503	—	14
15.	Bulk Handlers, Inc.	—	—	1
16.	California Stevedore & Ballast Co.	1,369,474	—	14
17.	Canadian Gulf Line, Ltd.	268,718	—	3
18.	W. R. Chamberlin & Co.	65,631	24	1
19.	Coast Stevedore Co.	—	—	1
20.	Coastwise Line	—	50	1
21.	Columbia Basin Terminals	—	—	1
22.	Consolidated Steve. Co.	17,119	—	1
[2] 23.	Crescent Wharf & Warehouse Co.	355,923	—	4
24.	Daido Kaiun Kaisha	—	—	1
25.	The East Asiatic Co., Inc.	112,239	—	2
26.	Encinal Terminals	—	—	1
27.	Everett Stevedoring Co.	53,126	—	1
28.	Fern-Ville Lines	15,987	—	1
29.	Flota Mercante Grancolobiana, S.A.	—	—	1
30.	French Line	202,368	—	3
31.	Furness, Withy & Co., Ltd.	312,273	—	4
32.	General Steve. & Ballast Co.	27,975	—	1
33.	Grace Line, Inc.	284,860	297	5
34.	Griffiths & Sprague Steve. Co.	—	—	1

Exhibit 40

	Company	Tonnage	Personnel	Votes
	35. Hamburg-Amerika Line	—	—	1
	36. Holland-America Line	174,484	—	2
	37. Howard Terminal	261,540	—	3
	38. Humboldt Steve. Co., Ltd.	55,750	—	1
	39. Iino Lines	—	—	1
	40. Independent Stevedore Co.	200,082	—	3
	41. Indies Terminal Co.	—	—	1
	42. International Terminals, Inc.	—	—	1
	43. Interocean Line	258,960	—	3
	44. Interstate Carloading Co.	—	—	1
	45. Italian Line	154,993	—	2
	46. Johnson Line	345,399	—	4
	47. Jones Stevedoring Co.	1,741,528	—	18
	48. W. J. Jones & Son, Inc.	2,676,252	—	27
	49. Kawasaki Kisen Kaisha, Ltd.	16,671	—	1
	50. Kerr Steamship Co., Inc.	266,375	—	3
[3]	51. Klaveness Line	29,520	—	1
	52. Knutsen Line	134,039	—	2
	53. Lines Service Steve. Inc.	—	—	1
	54. Luckenbach SS Co., Inc.	557,377	57	6
	55. M. & R. Services, Inc.	29,400	—	1
	56. Maersk Line Agency	40,758	—	1
	57. Marine Terminals Corp.	398,326	—	4
	58. Marine Terminals Corp. of L.A.	607,190	—	7
	59. Matson Navigation Company	2,844,316	2138	50
	60. Matson Terminals, Inc.	—	—	1
	61. Metropolitan Steve. Co.	1,254,142	—	13
	62. Mitsui Steamship Co., Ltd.	29,361	—	1
	63. Mutual Terminals, Inc.	—	—	1
	64. Nippon Yusen Kaisha	—	—	1
	65. North German Lloyd	—	—	1
	66. Oceanic Steamship Co.	—	—	1
	67. Ocean Terminals	—	—	1
	68. Fred Olsen Line Agency, Ltd.	206,871	—	3
	69. Olympia Stevedoring Co.	2,223	—	1
	70. Olympic-Griffiths Lines, Inc.	—	—	1
	71. Olympic Peninsula Steve. Co.	12,017	—	1
	72. Olympic Steamship Co., Inc.	—	25	1
	73. Oregon Stevedoring Co., Inc.	47,463	—	1
	74. Outer Harbor Dock & Wharf, Inc.	13,453	—	1

Exhibit 40

	Company	Tonnage	Personnel	Votes
75.	Overseas Shipping Co.	160,844	—	2
76.	Pacific Atlantic SS Co.	—	—	1
77.	Pacific Australia Direct Line	—	—	1
78.	Pacific Far East Line, Inc.	811,668	957	18
[4] 79.	Pacific Islands Transport Line	29,106	—	1
80.	Pacific Oriental Terminal	—	—	1
81.	Pacific Orient Express Line	103,559	—	2
82.	Pacific Ports Service Co.	—	—	1
83.	Pacific Republics Line	222,074	370	6
84.	Panama Pacific Line	—	—	1
85.	Parr-Richmond Terminal Co.	198,378	—	2
86.	Pope & Talbot, Inc.	422,655	319	8
87.	Portland Stevedoring Co.	715,461	—	8
88.	Rothschild-International Steve. Co.	1,329,321	—	14
89.	Rothschild's Alaska Steve. Co., Inc.	1,724	—	1
90.	Royal Mail Lines, Ltd.	143,295	—	2
91.	Salmon Terminals	—	—	1
92.	The San Francisco Steve. Co.	48,420	—	1
93.	Schirmer Stevedore Co., Ltd.	58,052	—	1
94.	Seaboard Stevedoring Corp.	193,528	—	2
95.	Seattle Bulk Loading Terminal, Inc.	306,154	—	4
96.	Seattle Stevedore Co.	1,278,732	—	13
97.	Shaffer Terminals	—	—	1
98.	C. F. Sharp & Co., Inc.	—	—	1
99.	Star Terminal Co., Inc.	—	—	1
100.	States Marine Lines	570,814	—	6
101.	States Steamship Co.	512,680	653	12
102.	Tait Stevedoring Co., Inc.	95,276	—	1
103.	Transpacific Trans. Co.	445,683	—	5
[5] 104.	Twin Harbor Steve. & Tug Co.	94,524	—	1
105.	Union SS Co. of N.Z., Ltd.	17,033	—	1
106.	Washington Stevedoring Co.	42,006	—	1
107.	West Coast Steamship Co.	—	190	2
108.	West Coast Terminals Co. of Calif.	165,732	—	2
109.	Westfal-Larsen Co. Line	128,266	—	2
110.	Weyerhaeuser Steamship Co.	384,359	280	6
111.	Willapa Harbor Steve. Co.	31,248	—	1
112.	Williams, Dimond & Co.	—	—	1
113.	Yerba Buena Corp.	33,232	—	1
114.	Zidell Docks, Inc.	38,878	—	1
	Total	28,217,790	8,212	438

Exhibit 41

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

March 13, 1962

TO BOARD OF DIRECTORS.

CERTIFICATION OF 1961 TONNAGE AND AVERAGE MONTHLY SEAGOING PERSONNEL FOR QUARTER ENDING DECEMBER 31, 1961 FOR VOTING PURPOSES 1962

Article VI, Section 2 of the Association By-Laws requires the Secretary to certify to the Board of Directors the tonnage of cargo loaded and/or discharged by or for each member during the preceding calendar year. The Section also requires the Secretary to report the average number of seagoing employees employed by members of the Passenger Line Group, Coastwise Group, Alaska Group, Intercoastal Line Group and Offshore Group, during the preceding quarter. These employees work under collective bargaining contracts executed by the Association on behalf of members in the above groups. There is submitted for your consideration a listing of members and the tonnage and average number of seagoing employees reported by them as recorded in the financial records of the Association.

Opposite each member is listed the number of votes based on tonnage and seagoing employees as provided in the By-Laws; i.e., one vote for each member and, in addition, one vote for each full 100,000 tons and one vote for each full 100 seagoing employees.

Respectfully submitted,

PACIFIC MARITIME ASSOCIATION
J. A. Robertson
Secretary

JAR:ah
Attachment

Exhibit 41

(Attached to Exhibit 41)

[1] PACIFIC MARITIME ASSOCIATION

Voting Strength

Based on 1959 Tonnage and Average Seagoing Personnel
For the Quarter Ending December 31, 1961

	Company	Tonnage	Personnel	Votes
1.	Alaska Steamship Company	407,652	274	7
2.	Alaska Terminal & Steve. Co.	2,065	—	1
3.	Albin Stevedore Co.	53,107	—	1
4.	Albina Dock Company	—	—	1
5.	American Mail Line	442,469	443	9
6.	American President Lines	427,900	2,133	26
7.	Anacortes Stevedoring Co.	3,307	—	1
8.	Associated-Banning Co.	649,006	—	7
9.	Balfour, Guthrie & Co., Ltd.	681,185	—	7
10.	Barber Steamship Lines, Inc.	37,162	—	1
11.	Bellingham Steve. Co.	45,270	—	1
12.	The Blue Star Line, Inc.	102,994	—	2
13.	Brady-Hamilton Steve. Co.	1,321,176	—	14
14.	Bulk Handlers, Inc.	48,967	—	1
15.	California Stevedore & Ballast Co.	1,702,297	—	18
16.	Calmar Steamship Corp.	539,036	—	6
17.	Canadian Gulf Line, Ltd.	255,301	—	3
18.	W. R. Chamberlin & Co.	44,061	24	1
19.	Coast Stevedore Co.	51,661	—	1
20.	Coastwise Line	—	—	1
21.	Consolidated Steve. Co.	150,979	—	2
[2] 22.	Crescent Wharf & Warehouse Co.	225,844	—	3
23.	Daido Kaiun Kaisha	77,962	—	1
24.	Diablo Seaway Terminals	108,128	—	2
25.	The East Asiatic Co., Inc.	79,622	—	1
26.	Encinal Terminals	14,574	—	1
27.	Everett Stevedoring Co.	33,950	—	1
28.	Fern-Ville Lines	12,373	—	1
29.	Flota Mercante Grancolobiana, S.A.	—	—	1
30.	French Line	168,643	—	2
31.	Furness, Withy & Co., Ltd.	244,205	—	3
32.	General Steve. & Ballast Co.	150,743	—	2
33.	Grace Line, Inc.	289,524	335	6

Exhibit 41

	Company	Tonnage	Personnel	Votes
	34. Griffiths & Sprague Steve. Co.	—	—	1
	35. Hamburg-Amerika Line	—	—	1
	36. Holland-America Line	159,806	—	2
	37. Howard Terminal	267,835	—	3
	38. Humboldt Steve. Co., Ltd.	49,406	—	1
	39. Iino Lines	64,759	—	1
	40. Independent Stevedore Co.	157,088	—	2
	41. Indies Terminal Co.	—	—	1
	42. International Terminals, Inc.	—	—	1
	43. Interocean Line	173,758	—	2
	44. Interstate Carloading Co.	—	—	1
	45. Italian Line	80,676	—	1
	46. Johnson Line	354,894	—	4
	47. Jones Stevedoring Co.	1,412,571	—	15
[3]	48. W. J. Jones & Son, Inc.	2,348,905	—	24
	49. Kawasaki Kisen Kaisha, Ltd.	189,668	—	2
	50. Kerr Steamship Co., Inc.	10,824	—	1
	51. Klaveness Line	20,107	—	1
	52. Knutsen Line	137,603	—	2
	53. Lines Service Steve. Inc.	—	—	1
	54. Luckenbach SS Co., Inc.	92,124	—	1
	55. Maersk Line Agency	42,564	—	1
	56. Marine Terminals Corp.	470,856	—	5
	57. Marine Terminals Corp. of L. A.	750,505	—	8
	58. Matson Navigation Company	2,801,018	1,788	46
	59. Matson Terminals, Inc.	—	—	1
	60. Metropolitan Steve. Co.	1,934,256	—	20
	61. Mitsubishi Shipping Co., Ltd.	19,723	—	1
	62. Mitsui Steamship Co., Ltd.	223,736	—	3
	63. Mutual Terminals, Inc.	—	—	1
	64. Nippon Yusen Kaisha	127,304	—	2
	65. North German Lloyd	—	—	1
	66. The Oceanic Steamship Co.	—	—	1
	67. Ocean Terminals	—	—	1
	68. Fred Olsen Line Agency, Ltd.	198,448	—	2
	69. Olympia Stevedoring Co.	21,164	—	1
	70. Olympic-Griffiths Lines, Inc.	—	—	1
	71. Olympic Peninsula Steve. Co.	28,656	—	1
	72. Olympic Steamship Co., Inc.	—	—	1

Exhibit 41

	Company	Tonnage	Personnel	Votes
	73. Oregon Stevedoring Co., Inc.	66,476	—	1
	74. Osaka Shosen Kaisha	—	—	1
[4]	75. Outer Harbor Dock & Wharf, Inc.	—	—	1
	76. Overseas Shipping Co.	179,658	—	2
	77. Pacific Atlantic SS Co.	—	—	1
	78. Pacific Australia Direct Line	—	—	1
	79. Pacific Far East Line, Inc.	569,836	849	14
	80. Pacific Islands Transport Line	35,388	—	1
	81. Pacific Oriental Terminal	—	—	1
	82. Pacific Orient Express Line	109,587	—	2
	83. Pacific Ports Service Co.	—	—	1
	84. Pacific Republics Line	198,185	317	5
	85. Panama Pacific Line	—	—	1
	86. Parr-Richmond Terminal Co.	338,197	—	4
	87. Pope & Talbot, Inc.	413,123	376	8
	88. Portland Stevedoring Co.	684,379	—	7
	89. Rothschild-International Steve. Co.	945,597	—	10
	90. Rothschild's Alaska Steve. Co., Inc.	—	—	1
	91. Royal Mail Lines, Ltd.	132,945	—	2
	92. Salmon Terminals	—	—	1
	93. The San Francisco Steve. Co., Inc.	—	—	1
	94. Schirmer Stevedore Co., Ltd.	11,981	—	1
	95. Scrap Loaders, Inc.	—	—	1
	96. Seaboard Stevedoring Corp.	158,416	—	2
	97. Seattle Bulk Loading Terminal, Inc.	260,291	—	3
	98. Seattle Stevedore Co.	920,484	—	10
[5]	99. C. F. Sharp & Co., Inc.	—	—	1
	100. Shinnihon Steamship Co.	—	—	1
	101. Star Terminal Co., Inc.	—	—	1
	102. States Marine Lines	767,634	—	8
	103. States Steamship Co.	454,849	653	11
	104. Stockton Bulk Terminal Co.	—	—	1
	105. Stockton Stevedore Co.	—	—	1
	106. Tacoma Stevedore & Terminal Co.	—	—	1
	107. Tait Stevedoring Co., Inc.	74,029	—	1
	108. Transpacific Trans. Co.	461,541	—	5
	109. Twin Harbor Steve. & Tug Co.	55,036	—	1
	110. Union SS Co. of N. Z., Ltd.	25,310	—	1
	111. Washington Stevedoring Co.	31,234	—	1
	112. West Coast Steamship Co.	—	161	2

Exhibit 46

Company	Tonnage	Personnel	Votes
113. West Coast Terminals Co. of California	—	—	1
114. Westfal-Larsen Co. Line	137,509	—	2
115. Westfall Stevedore Co.	—	—	1
116. Weyerhaeuser Steamship Co.	324,560	152	5
117. Willapa Harbor Steve. Co.	14,397	—	1
118. Williams, Dimond & Co.	—	—	1
119. Yerba Buena Corp.	8,580	—	1
120. Zidell Docks, Inc.	117,048	—	2
TOTAL	28,005,687	7,505	433

Exhibit 46

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

March 3, 1960

To Members:

For your information and guidance, we are attaching a revised up-to-date membership list of Pacific Maritime Association, which was certified to the Board of Directors at the meeting held on February 24, 1960.

We also enclose a list of the Board of Directors elected to serve for the year 1960 and their appointed alternates. Members of the Board have been duly elected in accordance with Article V of the By-Laws of this Association.

By letter of February 16, 1960, the membership was notified of the special meeting to be held on Wednesday, February 24, 1960 in lieu of the annual meeting of the members of Pacific Maritime Association, and Item No. 6

Exhibit 46

referred to the proposed amendments to the By-Laws, which would be voted upon at this special meeting of the membership.

Proposed amendments to Section 1, Article VII of the By-Laws were discussed. It was moved, and seconded that the proposed amendment, designated No. 1 be approved. The motion was approved by vote of members holding two-thirds of the voting power of the entire membership. The vote was as follows: 286 — yes, 110 — absent.

The proposed amendment to Section 5 of Article XI of the By-Laws was discussed. On motion that the amendment be approved, the motion was approved by vote of members holding two-thirds of the voting power of the entire membership. The vote was as follows: 279 — yes, 7 — no, 110 — absent.

These two amendments having been approved by the necessary two-thirds of the voting power of the membership now become effective and the enclosed copies are as approved by the membership of this Association.

Very truly yours,

J. A. Robertson
Secretary

JAR:vs
Encl.

[1] PACIFIC MARITIME ASSOCIATION

MEMBERSHIP ROSTER

Name and Address of Member Co.	Group(s) *	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
1. Alaska Steamship Company Pier 42 Seattle 4, Washington	d, e				x
2. Alaska Terminal & Steve. Pier 42 Seattle 4, Washington	g, h				x
3. Albin Stevedore Company 3200 - 26th Ave., S. W. Seattle, Washington	g				x
4. Albina Dock Company 710 Lewis Building Portland 4, Oregon	h			x	
5. American-Hawaiian Steamship Co. 90 Broad St. New York 4, N. Y.					
6. American Mail Line, Ltd. 740 Stuart Building Seattle, Washington	e, g, h	x	x	x	x
7. American President Lines 311 California St. San Francisco, Calif.	a, e, h	x	x		

(Exh. 46, 1-2 of Att.)

Exhibit 46

| | | |

	Name and Address of Member Co.	Group(s) *	AREA So. Calif.	No. Calif.	Oregon & Col. River	Wash ington
17.	Canadian Gulf Line, Ltd. Pier 22 San Francisco 5, Calif.	f	x	x		
18.	W. R. Chamberlin & Co. 206 Portland Trust Bldg. Portland 4, Oregon	c			x	
19.	Coast Stevedore Co. 914 Water St. P. O. Box 997 South Bend, Washington	g, h				x
20.	Coastwise Line 141 Battery St. San Francisco, Calif.	c, d, e	x	x	x	x
21.	Columbia Basin Terminals 1788 N.W. Front Portland 9, Oregon	h			x	
22.	Consolidated Steve. Co. 268 Market St. San Francisco, Calif.	g		x		
[3] 23.	Crescent Wharf & Warehouse Co. 272 South Fries Ave. Wilmington, Calif.	g, h	x			
24.	The East Asiatic Co., Inc. 465 California St. San Francisco, Calif.	f	x	x	x	x

25. Encinal Terminals P. O. Drawer A Alameda, Calif.	h		x			
26. Everett Stevedoring Co. 1006 Hewitt Ave. Everett, Washington	g				x	
27. Fern-Ville Lines (Overseas Shipping Co., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x			
28. French Line (General SS Corp., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x	
29. Furness, Withy & Co., Ltd. 310 Sansome St. San Francisco, Calif.	f	x	x	x	x	
30. General Stevedore & Ballast Co. 224 Spear St. San Francisco, Calif.	g		x			
31. Grace Line Inc. 2 Pine St. San Francisco, Calif.	e, g, h	x	x	x	x	
32. Griffiths & Sprague Stevedoring Co. Pier 50 Seattle 4, Washington	g				x	

	Name and Address of Member Co.	Group(s) *	AREA So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
	33. Holland-America Line 324 Sansome St. San Francisco, Calif.	f	x	x	x	x
[4]	34. Howard Terminal 95 Market St. Oakland 4, Calif.	g, h		x		
	35. Humboldt Stevedore Co. Ltd. Foot of Washington St. Eureka, Calif.	g		x		
	36. Independent Stevedore Co. 210 N. Broadway, Box 1019 Coos Bay, Oregon	g			x	
	37. Indies Terminal Co. P. O. Box 1147 Wilmington, Calif.	h	x	x		
	38. International Terminals Inc. 812 Wilshire Blvd. Los Angeles, Calif.	h	x			
	39. Interocean Line (Westfal Larsen Co., Inc., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	x
	40. Interstate Carloading Co. 1214 N. W. Front Ave. Portland 9, Oregon	h			x	

41.	Italian Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x	
42.	Johnson Line (Grace Line Inc., Gen. Agts.) 2 Pine St. San Francisco, Calif.	f	x	x	x	x	
43.	Jones Stevedoring Co. 311 California St. San Francisco, Calif.	g	x	x			
44.	W. J. Jones & Son, Inc. 817 Board of Trade Bldg. Portland, Oregon	g			x		
45.	Kerr Steamship Co., Inc. 350 California St. San Francisco 4, Calif.	f	x	x	x	x	
[5] 46.	Klaveness Line (Overseas Shipping Co., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	x	
47.	Knutsen Line (Bakke Steamship Corp., Agts.) 311 California St. San Francisco, Calif.	f	x	x	x	x	
48.	Lines Service Stevedoring, Inc. 819-A Alabama San Francisco, Calif.	g		x			

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
49. Luckenbach Steamship Co., Inc. 100 Bush St. San Francisco, Calif.	b	x	x	x	x
50. M & R Services, Inc. P. O. Box 112 Pittsburg, Calif.	g, h		x		
51. Maersk Line Agency 510 West Sixth St. Los Angeles, Calif.	f	x			
52. Marine Terminals Corp. 261 Steuart St. San Francisco, Calif.	g, h	x	x		
53. Marine Terminals Corp. of Los Angeles 298 So. Pico Ave. P. O. Box 1068 Long Beach, Calif.	g, h	x			
54. Matson Navigation Co. 215 Market St. San Francisco, Calif.	a, e	x	x	x	x
55. Matson Terminals, Inc. 215 Market St. San Francisco, Calif.	g, h	x	x	x	x

56.	Metropolitan Steve. Co. 211 Marine Ave. P. O. Box 547 Wilmington, Calif.	g	x				
[6] 57.	Mutual Stevedoring Co. 289 Steuart St. San Francisco 5, Calif.	g, h		x			
58.	Mutual Terminals, Inc. 289 Steuart St. San Francisco 5, Calif.	g, h		x			
59.	Oceanic Steamship Co. 215 Market St. San Francisco, Calif.	a, e	x	x	x	x	
60.	Ocean Terminals 55 Sacramento St. San Francisco 4, Calif.	h	x	x			
61.	Fred. Olsen Line Agency Ltd. 465 California St. San Francisco, Calif.	f	x	x	x	x	
62.	Olympia Stevedoring Co. P. O. Box 192 Olympia, Washington	g				x	
63.	Olympic-Griffiths Lines, Inc. 1000 - 2nd Ave. Seattle 4, Washington	c	x	x	x	x	
64.	Olympic Peninsula Steve. 2247 East Marginal Way Seattle 4, Washington	g				x	

	Name and Address of Member Co.	Group(s) *	AREA So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
65.	Olympic Steamship Co., Inc. 1000 - 2nd Ave. Seattle 4, Washington	e, g, h	x	x	x	x
66.	Oregon Stevedoring Co., Inc. 3630 N. W. Front Ave. Portland 10, Oregon	g			x	
67.	Outer Harbor Dock & Wharf, Inc. 272 South Fries Ave. Wilmington, Calif.	g, h	x			
68.	Overseas Shipping Co. 310 Sansome St. San Francisco, Calif.	f, h	x	x	x	x
[7] 69.	Pacific Atlantic Steamship Co. 320 California St. San Francisco, Calif.	b, e	x	x	x	x
70.	Pacific Australia Direct Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
71.	Pacific Far East Line, Inc. 141 Battery St. San Francisco, Calif.	e	x	x	x	x
72.	Pacific Island Transport Lines (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x

73.	Pacific Oriental Terminal 351 California St. San Francisco, Calif.	h		x			
74.	Pacific Orient Express Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x	
75.	Pacific Ports Service Co. 2 Pine St. San Francisco 11, Calif.	h	x	x			
76.	Pacific Republics Line. (Moore-McCormack Lines, Inc.) 214 California St. San Francisco, Calif.	e	x	x	x	x	
77.	Panama Pacific Line 141 Battery St. San Francisco, Calif.	h	x				
78.	Parr-Richmond Terminal Co. 1 Drumm St. San Francisco, Calif.	g, h		x			
79.	Pope & Talbot, Inc. 100 Bush St. San Francisco 4, Calif.	b, g, h	x	x	x	x	
[8] 80.	Portland Stevedoring Co. 1320 S. W. Broadway Portland, Oregon	g			x		

Name and Address of Member Co.	Group(s) *	AREA So. Calif.	No. Calif.	Oregon & Col. River	Washingt.
81. Rothschild-International Stevedoring Co. 2247 East Marginal Way Seattle 4, Washington	g				x
82. Rothschild's Alaska Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x
83. Royal Mail Lines, Ltd. 1731 Exchange Bldg. Seattle 4, Washington	f	x	x	x	x
84. Salmon Terminals Pier 24 North Seattle 4, Washington	h				x
85. The San Francisco Steve. Co. 35 Brannan St. San Francisco, Calif.	g		x		
86. Schirmer Steve. Co., Ltd. 55 Sacramento St. San Francisco, Calif.	g		x		
87. Seaboard Steve. Corp. 2 Pine St. San Francisco, Calif.	g	x	x		

88.	Seattle Bulk Loading Terminal, Inc. Pier 50, Room 25 Seattle, Washington	g, h				x
89.	Seattle Stevedore Co. 1200 Westlake Ave., N. Seattle 9, Washington	g, h				x
90.	Shaffer Terminals P. O. Box 1157 Tacoma, Washington	h				x
91.	C. F. Sharp & Co., Inc. Central Tower, 703 Market St. San Francisco, Calif.	f	x	x		
[9] 92.	Star Terminal Co., Inc. Pier 22 San Francisco 5, Calif.	h	x	x		
93.	States Marine Lines 241 Sansome St. San Francisco, Calif.	b, e	x	x	x	x
94.	States Steamship Co. 320 California St. San Francisco, Calif.	e, h	x	x	x	x
95.	Tait Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x
96.	Transpacific Trans. Co. 351 California St. San Francisco, Calif.	f	x	x	x	x

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
97. Twin Harbor Stevedoring & Tug. Co. P. O. Box 716 Hoquiam, Washington	g				x
98. Union SS Co. of N. Z. Ltd. 230 California St. San Francisco, Calif.	f	x	x	x	x
99. Washington Stevedoring Co. 36 West Stacy St. Seattle 4, Washington	g				x
100. West Coast Steamship Co. 601 Board of Trade Bldg. Portland 4, Oregon	e			x	
101. West Coast Terminals Co. of California P. O. Box 2310, Station B San Francisco, Calif.	g, h	x	x		
102. Westfal-Larsen Co. Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
103. Weyehaeuser Steamship Co. 141 Battery St. San Francisco, Calif.	h	x	x	x	x
[10] 104. Willapa Harbor Steve. Co. Raymond, Washington	g				x

105.	Williams, Dimond & Co. 530 W. 6th St. Los Angeles, Calif.	f, h	x	x	x	x
106.	Yerba Buena Corp. 55 Sacramento St. San Francisco, Calif.	g, h		x		
107.	Zidell Docks, Inc. 3121 S. W. Moody St. Portland 1, Oregon	g			x	

GROUPS(S)

a. Passenger Line Group
b. Intercoastal Line Group
c. Coastwise Group
d. Alaska Group
e. Offshore Group
f. Foreign Line Group
g. Stevedore Group
h. Terminal Group

Exhibit 47

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

July 3, 1961

To MEMBERS.

For your information and guidance, we are attaching a Membership Roster of Pacific Maritime Association which was certified to the Board of Directors at the annual meeting held on March 9, 1961.

It would be appreciated if each member would check his listing to see if it is correct and current, both as to membership groupings and areas of operation. Also, please advise if we have listed your address incorrectly.

Also enclosed is listing of the members of the Board of Directors and their appointed alternates who are serving for the year 1961.

J. A. ROBERTSON,
Secretary.

JAR:ah
Enclosures

Exhibit 47

(Attached to Exhibit 47)

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

June 30, 1961

ERRATA SHEET

PACIFIC MARITIME ASSOCIATION

MEMBERSHIP ROSTER

Name & Address of Member Co.	
5. American Hawaiian SS Co.	*Delete.*
55. M & R Services, Inc.	*Change in Name*: *From*: M & R Services, Inc. *To*: Diablo Seaway Terminals
97. Seattle Stevedore Co.	*Change of Address*: *From*: 1200 Westlake Ave. N. *To*: 2900 - 11th Ave. S.W. Seattle 4, Washington

[1] PACIFIC MARITIME ASSOCIATION

Membership Roster

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
1. Alaska Steamship Company Pier 42 Seattle 4, Washington	d, e				x
2. Alaska Terminal & Steve. Pier 42 Seattle 4, Washington	g, h				x
3. Albin Stevedore Company 3200 - 26th Ave., S.W. Seattle, Washington	g				x
4. Albina Dock Company 710 Lewis Building Portland 4, Oregon	h			x	
5. American-Hawaiian SS Co. 360 Lexington Avenue New York 17, N. Y.					
6. American Mail Line, Ltd. 1010 Washington Bldg. Seattle, Washington	e, g, h	x	x	x	x
7. American President Lines 311 California Street San Francisco, California	a, e, h	x	x		

8.	Anacortes Stevedoring Co. 320 Commercial Ave. Anacortes, Washington	g					x
9.	Associated-Banning Co. P. O. Box 816 Wilmington, Calif.	g, h	x	x			
10.	Balfour, Guthrie & Co., Ltd. 255 California Street San Francisco, Calif.	f	x	x	x	x	
11.	Barber Steamship Lines, Inc. (Overseas Shipping Co., Agts.) 310 Sansome Street San Francisco, Calif.	f	x	x			
[2] 12.	Bellingham Stevedoring Co. 802 State St. Bellingham, Washington	g					x
13.	The Blue Star Line, Inc. 1801 Northern Life Tower Seattle 1, Washington	f	x	x	x	x	
14.	Brady-Hamilton Stevedore Co. 1725 N. W. 14th Ave. Portland 9, Oregon	g			x		
15.	Bulk Handlers, Inc. Pier 32 San Francisco, Calif.	g		x	x		
16.	California Stevedore & Ballast Co. 160 Folsom St. San Francisco, Calif.	g, h		x			

Name and Address of Member Co.	Group(s) *	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
17. Calmar Steamship Corporation 25 Broadway New York 4, N. Y.	b	x	x	x	x
18. Canadian Gulf Line, Ltd. Pier 22 San Francisco 5, Calif.	f	x	x		
19. W. R. Chamberlin & Co. 206 Portland Trust Bldg. Portland 4, Oregon	c			x	
20. Coast Stevedore Co. 914 Water St. P. O. Box 997 South Bend, Washington	g, h				x
21. Coastwise Line 141 Battery St. San Francisco, Calif.	c, d, e	x	x	x	
22. Columbia Basin Terminals 1788 N. W. Front Portland 9, Oregon	h			x	
23. Consolidated Steve. Co. 268 Market St. San Francisco, Calif.	g		x		
24. Crescent Wharf & Warehouse Co. 272 South Fries Ave. Wilmington, Calif.	g, h	x			

[3] 25.	Daido Kaiun Kaisha (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
26.	The East Asiatic Co., Inc. 465 California St. San Francisco, Calif.	f	x	x	x	x
27.	Encinal Terminals P. O. Drawer A Alameda, Calif.	g, h		x		
28.	Everett Stevedoring Co. 1006 Hewitt Ave. Everett, Washington	g				x
29.	Fern-Ville Lines (Overseas Shipping Co., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	
30.	Flota Mercante Grancolobiana, S.A. (Balfour, Guthrie & Co., Ltd., Agts.) 255 California St. San Francisco, Calif.	f	x	x	x	x
31.	French Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
32.	Furness, Withy & Co., Ltd. 310 Sansome St. San Francisco, Calif.	f	x	x	x	x

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
33. General Stevedore & Ballast Co. 224 Spear St. San Francisco, Calif.	g		x		
34. Grace Line, Inc. 2 Pine St. San Francisco, Calif.	e, g, h	x	x	x	x
35. Griffiths & Sprague Stevedoring Co. Pier 50 Seattle 4, Washington					
36. Hamburg-Amerika Line (Balfour, Guthrie & Co., Ltd., Agts.) 255 California St. San Francisco, Calif.	f	x	x	x	x
[4] 37. Holland-America Line 324 Sansome St. San Francisco, Calif.	f	x	x	x	x
38. Howard Terminal 95 Market St. Oakland 4, Calif.	g, h		x		
39. Humboldt Stevedore Co., Ltd. Foot of Washington St. Eureka, Calif.	g		x		
40. Iino Lines (Bakke Steamship Corp., Agts.) 311 California St. San Francisco 4, Calif.	f	x	x	x	x

Exhibit 47

(Exh. 47, 4 of Att.)

41. Independent Stevedore Co. 210 N. Broadway, Box 1019 Coos Bay, Oregon	g			x		
42. Indies Terminal Co. P. O. Box 1147 Wilmington, Calif.	h	x	x			
43. International Terminals, Inc. 812 Wilshire Blvd. Los Angeles, Calif.	h	x				
44. Interocean Line (Westfal Larsen Co., Inc., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	x	
45. Interstate Carloading Co. 1214 N. W. Front Ave. Portland 9, Oregon	h			x		
46. Italian Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x	
47. Johnson Line (Grace Line, Inc., Gen. Agts.) 2 Pine St. San Francisco, Calif.	f	x	x	x	x	
48. Jones Stevedoring Co. 311 California St. San Francisco, Calif.	g	x	x			

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
49. W. J. Jones & Son, Inc. 817 Board of Trade Bldg. Portland, Oregon	g			x	
[5] 50. Kawasaki Kisen Kaisha, Ltd. (Kerr SS Co., Inc., Gen. Agts.) 350 California St. San Francisco, Calif.	f	x	x	x	x
51. Kerr Steamship Co., Inc. 350 California St. San Francisco 4, Calif.	f	x	x	x	x
52. Klaveness Line (Overseas Shipping Co., Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	x
53. Knutsen Line (Bakke Steamship Corp., Agts.) 311 California St. San Francisco, Calif.	f	x	x	x	x
54. Lines Service Stevedoring 819-A Alabama San Francisco, Calif.	g		x		
55. M & R Services, Inc. P. O. Box 112 Pittsburg, Calif.	g, h		x		

56.	Maersk Line Agency 510 West Sixth St. Los Angeles, Calif.	f	x				
57.	Marine Terminals Corp. 261 Steuart St. San Francisco, Calif.	g, h	x	x			
58.	Marine Terminals Corp. of Los Angeles 298 So. Pico Ave. P. O. Box 1068 Long Beach, Calif.	g, h	x				
59.	Matson Navigation Company 215 Market St. San Francisco, Calif.	a, e	x	x	x	x	
60.	Matson Terminals, Inc. 480 Main St. San Francisco, Calif.	g, h	x	x	x	x	
61.	Metropolitan Steve. Co. 211 Marine Avenue P. O. Box 547 Wilmington, Calif.	g	x				
[6] 62.	Mitsubishi Shipping Co., Ltd. (Oceanic Agencies, Inc., Gen. Agts.) 310 Sansome St. San Francisco, Calif.	f	x	x	x	x	
63.	Mitsui Steamship Co., Ltd. (Mitsui Line Agencies, Inc.) 201 Pine St. San Francisco 4, Calif.	f	x	x	x	x	

Name and Address of Member Co.	Group(s) *	AREA So. Calif.	No. Calif.	Oregon & Col. River	Washington
64. Mutual Terminals, Inc. 289 Steuart St. San Francisco 5, Calif.	g, h		x		
65. Nippon Yusen Kaisha 311 California St. San Francisco, Calif.	f	x	x	x	x
66. North German Lloyd (Balfour, Guthrie & Co., Ltd., Agts.) 255 California St. San Francisco, Calif.	f	x	x	x	x
67. Oceanic Steamship Co. 215 Market St. San Francisco, Calif.	a, e	x	x	x	x
68. Ocean Terminals 55 Sacramento St. San Francisco 4, Calif.	h	x	x		
69. Fred Olsen Line Agency, Ltd. 465 California St. San Francisco, Calif.	f	x	x	x	x
70. Olympia Stevedoring Co. P. O. Box 192 Olympia, Washington	g				x
71. Olympic-Griffiths Lines, Inc. 1000 - 2nd Ave. Seattle 4, Washington	c	x	x	x	x

72.	Olympic Peninsula Steve. 2247 East Marginal Way Seattle 4, Washington	g				x
73.	Olympic Steamship Co., Inc. 1000 - 2nd Ave. Seattle 4, Washington	e, g, h	x	x	x	x
[7] 74.	Oregon Steve. Co., Inc. 3630 N. W. Front Ave. Portland 10, Oregon	g			x	
75.	Outer Harbor Dock & Wharf, Inc. 272 South Fries Ave. Wilmington, Calif.	g, h	x			
76.	Overseas Shipping Co. 310 Sansome St. San Francisco, Calif.	f, h	x	x	x	x
77.	Pacific Atlantic Steamship 320 California St. San Francisco, Calif.	b, e	x	x	x	x
78.	Pacific Australia Direct Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
79.	Pacific Far East Line, Inc. 141 Battery St. San Francisco, Calif.	e	x	x	x	x
80.	Pacific Island Transport Lines. (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
81. Pacific Oriental Terminal 351 California St. San Francisco, Calif.	h		x		
82. Pacific Orient Express Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x
83. Pacific Ports Service Co. 2 Pine St. San Francisco 11; Calif.	h	x	x		
84. Pacific Republics Line (Moore-McCormick Lines, Inc.) 214 California St. San Francisco, Calif.	e	x	x	x	x
85. Panama Pacific Line 141 Battery St. San Francisco, Calif.	h	x			
[8] 86. Parr-Richmond Terminal 1 Drumm St. San Francisco, Calif.	g, h		x		
87. Pope & Talbot, Inc. 100 Bush St. San Francisco 4, Calif.	h, g, h	x	x	x	x

88. Portland Stevedoring Co. 1320 S. W. Broadway Portland, Oregon	g			x		
89. Rothschild-International Stevedoring Co. 2247 East Marginal Way Seattle 4, Washington	g				x	
90. Rothschild's Alaska Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x	
91. Royal Mail Lines, Ltd. 1731 Exchange Bldg. Seattle 4, Washington	f	x	x	x	x	
92. Salmon Terminals Pier 24 North Seattle 4, Washington	h				x	
93. The San Francisco Steve. Company 35 Brannan St. San Francisco, Calif.	g		x			
94. Schirmer Steve. Co., Ltd. 55 Sacramento St. San Francisco, Calif.	g		x			
95. Seaboard Steve. Corp. 2 Pine St. San Francisco, Calif.	g	x	x			

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
96. Seattle Bulk Loading Terminal, Inc. Pier 50, Room 28 Seattle, Washington	g, h				x
97. Seattle Stevedore Co. 1200 Westlake Ave., N. Seattle 9, Washington	g, h				x
[9] 98. Shaffer Terminals P. O. Box 1157 Tacoma, Washington	h				x
99. C. F. Sharp & Co., Inc. Central Tower 703 Market St. San Francisco, Calif.	f	x	x		
100. Shinnihon Steamship Co., Ltd. (Balfour, Guthrie & Co., Ltd., Agts.) 255 California St. San Francisco, Calif.	f	x	x	x	x
101. Star Terminal Co., Inc. Pier 22 San Francisco, Calif.	h	x	x		
102. States Marine Lines 241 Sansome St. San Francisco, Calif.	b, e	x	x	x	x

103.	States Steamship Co. 320 California St. San Francisco, Calif.	e, h	x	x	x	x
104.	Tait Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x
105.	Transpacific Trans. Co. 351 California St. San Francisco, Calif.	f	x	x	x	x
106.	Twin Harbor Stevedoring & Tug Co. P. O. Box 716 Hoquiam, Washington	g				x
107.	Union SS Co. of N. Z., Ltd. 230 California St. San Francisco, Calif.	f	x	x	x	x
108.	Washington Stevedoring Co. 36 West Stacy St. Seattle 4, Washington	g				x
[10] 109.	West Coast Steamship Co. 601 Board of Trade Bldg. Portland 4, Oregon	e			x	
110.	West Coast Terminals Co. of California P. O. Box 2310, Station B San Francisco, Calif.	g, h	x	x		
111.	Westfal-Larsen Co. Line (General SS Corp., Ltd., Agts.) 432 California St. San Francisco, Calif.	f	x	x	x	x

Name and Address of Member Co.	Group(s) *	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Washington
112. Weyerhaeuser Steamship Company 141 Battery St. San Francisco, Calif.	b	x	x	x	x
113. Willapa Harbor Steve. Co. Raymond, Washington	g				x
114. Williams, Dimond & Co. 530 W. 6th St. Los Angeles, Calif.	f, h	x	x	x	x
115. Yerba Buena Corp. 55 Sacramento St. San Francisco, Calif.	g, h		x		
116. Zidell Docks, Inc. 3121 S. W. Moody St. Portland 1, Oregon	g			x	

GROUP(S) *

a. Passenger Line Group
b. Intercoastal Line Group
c. Coastwise Group
d. Alaska Group
e. Offshore Group
f. Foreign Line Group
g. Stevedore Group
h. Terminal Group

Exhibit 48

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone Douglas 2-7973
San Francisco 11, Cal.

April 25, 1962

ERRATA SHEET

PACIFIC MARITIME ASSOCIATION

MEMBERSHIP ROSTER

Name and Address of Member Co.	Group(s) *	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
Capitol Stevedore Co. 2900 - 11th Ave., SW Seattle 4, Washington	g				x
Crown Zellerbach Corporation 1 Bush Street San Francisco, California	h	x			
Twin Harbors Terminal Company Pier C, Berth 20 Long Beach, California	h	x			

(The above companies were admitted to membership in the Association since the Membership Roster was prepared.)

(Exh. 48, 1)

[1] PACIFIC MARITIME ASSOCIATION

Membership Roster

Name and Address of Member Co.	Group(s)	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
1. Alaska Steamship Company Pier 42 Seattle 4, Washington	d, e				x
2. Alaska Terminal & Steve. Pier 42 Seattle 4, Washington	g, h				x
3. Albin Stevedore Company 3200 - 26th Ave. S.W. Seattle, Washington	g				x
4. Albina Dock Company 710 Lewis Building Portland 4, Oregon	h			x	
5. American Mail Line, Ltd. 1010 Washington Bldg. Seattle, Washington	e, g, h	x	x	x	x
6. American President Lines 601 California Street San Francisco, California	a, e, h	x	x		
7. Anacortes Stevedoring Co. 320 Commercial Ave. Anacortes, Washington	g				x

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8.	Associated Banning Co. P. O. Box 816 Wilmington, Calif.	g, h	x	x			
9.	Balfour, Guthrie & Co., Ltd. 255 California Street San Francisco, California	f	x	x	x	x	
10.	Barber Steamship Lines, Inc. (Overseas Shipping Co., Agts.) 310 Sansome Street San Francisco, California	f	x	x			
11.	Bellingham Stevedoring Co. 802 State Street Bellingham, Washington	g				x	
12.	The Blue Star Line, Inc. 1801 Northern Life Tower Seattle 1, Washington	f	x	x	x	x	
[2] 13.	Brady-Hamilton Stevedore Co. 1725 N. W. 14th Ave. Portland 9, Oregon	g			x		
14.	Bulk Handlers, Inc. Pier 32 San Francisco, California	g		x	x		
15.	California Stevedore & Ballast Co. 160 Folsom Street San Francisco, California	g, h		x			
16.	Calmar Steamship Corp. 25 Broadway New York 4, N. Y.	b	x	x	x	x	

(Exh. 48, 1-2)

Name and Address of Member Co.	Group(s)	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
17. Canadian Gulf Line, Ltd. Pier 22 San Francisco 5, Calif.	f	x	x		
18. W. R. Chamberlin & Co. 206 Portland Trust Bldg. Portland 4, Oregon	c			x	
19. Coast Stevedore Co. 914 Water Street P. O. Box 997 South Bend, Washington	g, h				x
20. Coastwise Line 601 Montgomery Street San Francisco, Calif.	c, d, e	x	x	x	
21. Consolidated Steve. Co. 268 Market Street San Francisco, Calif.	g		x		
22. Crescent Wharf & Warehouse Co. 272 South Fries Avenue Wilmington, Calif.	g, h	x			
23. Daido Kaiun Kaisha (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x

[3]	24. Diablo Seaway Terminals P. O. Box 112 Pittsburg, Calif.	g, h		x			
	25. The East Asiatic Co., Inc. 465 California Street San Francisco, Calif.	f	x	x	x	x	
	26. Encinal Terminals P. O. Drawer A Alameda, Calif.	g, h		x			
	27. Everett Stevedoring Co. 1006 Hewitt Avenue Everett, Washington	g				x	
	28. Fern-Ville Lines (Overseas Shipping Co., Agts.) 310 Sansome Street San Francisco, Calif.	f	x	x	x		
	29. Flota Mercante Grancolobiana, S.A. (Balfour, Guthrie & Co., Ltd., Agts.) 255 California Street San Francisco, Calif.	f	x	x	x	x	
	30. French Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x	
	31. Furness, Withy & Co., Ltd. 310 Sansome Street San Francisco, Calif.	f	x	x	x	x	

575a

Exhibit 48

(Exh. 48, 3)

Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
32. General Stevedore & Ballast Co. Pier 9 San Francisco, Calif.	g		x		
33. Grace Line, Inc. 2 Pine Street San Francisco, Calif.	e, g, h	x	x	x	x
34. Griffiths & Sprague Stevedoring Co. Pier 50 Seattle 4, Washington	g				x
35. Hamburg-Amerika Line (Balfour, Guthrie & Co., Ltd., Agts.) 255 California Street San Francisco, Calif.	f	x	x	x	x
[4] 36. Holland-America Line 324 Sansome Street San Francisco, Calif.	f	x	x	x	x
37. Howard Terminal 95 Market Street Oakland 4, Calif.	g, h		x		
38. Humboldt Stevedore Co., Ltd. Foot of Washington Street Eureka, Calif.	g		x		
39. Iino Lines (Bakke Steamship Corp., Agts.) 311 California Street San Francisco 4, Calif.	f	x	x	x	x

40. Independent Stevedore Co. 210 N. Broadway, Box 1019 Coos Bay, Oregon	g			x		
41. Indies Terminal Co. P. O. Box 1147 Wilmington, Calif.	h	x	x			
42. International Terminals, Inc. 812 Wilshire Blvd. Los Angeles, Calif.	h	x				
43. Interocean Line (Westfal Larsen Co., Inc., Agts.) 310 Sansome Street San Francisco, Calif.	f	x	x	x	x	
44. Interstate Carloading Co. 3838 N.W. Front Ave. Portland 10, Oregon	h			x		
45. Italian Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x	
46. Johnson Line (Grace Line, Inc., Gen. Agts.) 2 Pine Street San Francisco, Calif.	f	x	x	x	x	
47. Jones Stevedoring Co. 211 Brannan Street San Francisco 7, Calif.	g	x	x			

	Name and Address of Member Co.	Group(s) *	AREA			
			So. Calif.	No. Calif.	Oregon & Col. River	Washington
[5]	48. W. J. Jones & Son, Inc. 817 Board of Trade Bldg. Portland, Oregon	g			x	
	49. Kawasaki Kisen Kaisha, Ltd. (Kerr Steamship Company, Inc., General Agents) 350 California Street San Francisco, Calif.	f	x	x	x	x
	50. Kerr Steamship Co., Inc. 350 California Street San Francisco 4, Calif.	f	x	x	x	x
	51. Klaveness Line (Overseas Shipping Co., Agts.) 310 Sansome Street San Francisco, Calif.	f	x	x	x	x
	52. Knutsen Line (Bakke Steamship Corp., Agts.) 311 California Street San Francisco, Calif.	f	x	x	x	x
	53. Lines Service Stevedoring 819-A Alabama San Francisco, Calif.	g		x		
	54. Luckenbach Steamship Co. 120 Wall Street New York 5, N. Y.					

55.	Maersk Line Agency 615 South Flower St. Los Angeles 17, California	f	x				
56.	Marine Terminals Corp. 261 Steuart Street San Francisco, Calif.	g, h	x	x			
57.	Marine Terminals Corp. of Los Angeles 298 So. Pico Ave. P. O. Box 1068 Long Beach, Calif.	g, h	x				
58.	Matson Navigation Company 215 Market Street San Francisco, Calif.	a, e	x	x	x	x	
59.	Matson Terminals, Inc. 480 Main Street San Francisco, Calif.	g, h	x	x	x	x	
[6] 60.	Metropolitan Steve. Co. 211 Marine Avenue P. O. Box 547 Wilmington, Calif.	g	x				
61.	Mitsubishi Shipping Co., Ltd. (Oceanic Agencies, Inc., Gen. Agts.) 310 Sansome Street San Francisco, Calif.	f	x	x	x	x	
62.	Mitsui Steamship Co., Ltd. (Mitsui Line Agencies, Inc.) 201 Pine Street San Francisco 4, Calif.	f	x	x	x	x	

Name and Address of Member Co.	Group(s)	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Washingt
63. Mutual Terminals, Inc. 289 Steuart Street San Francisco, Calif.	g, h		x		
64. Nippon Yusen Kaisha 311 California Street San Francisco, Calif.	f	x	x	x	x
65. North German Lloyd (Balfour, Guthrie & Co., Ltd., Agts.) 255 California Street San Francisco, Calif.	f	x	x	x	x
66. The Oceanic Steamship Co. 215 Market Street San Francisco, Calif.	a, e	x	x	x	x
67. Ocean Terminals 55 Sacramento Street San Francisco 4, Calif.	h	x	x		
68. Fred Olsen Line Agency, Ltd. 465 California Street San Francisco, Calif.	f	x	x	x	x
69. Olympia Stevedoring Co. P. O. Box 192 Olympia, Washington	g				x
70. Olympic-Griffiths Lines, Inc. 1000 - 2nd Avenue Seattle 4, Washington	c	x	x	x	x

71.	Olympic Peninsula Steve. 2247 East Marginal Way Seattle 4, Washington	g				x
[7] 72.	Olympic Steamship Co., Inc. 1000 - 2nd Avenue Seattle 4, Washington	e, g, h	x	x	x	x
73.	Oregon Steve. Co., Inc. 3630 N. W. Front Avenue Portland 10, Oregon	g			x	
74.	Osaka Shosen Kaisha (Williams, Dimond & Co., Agents) 530 West 6th Street Los Angeles 14, Calif.	f	x	x	x	x
75.	Outer Harbor Dock & Wharf, Inc. 272 South Fries Avenue Wilmington, Calif.	g, h	x			
76.	Overseas Shipping Co. 310 Sansome Street San Francisco, Calif.	f, h	x	x	x	x
77.	Pacific Atlantic Steamship 320 California Street San Francisco, Calif.	b, e	x	x	x	x
78.	Pacific Australia Direct Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x
79.	Pacific Far East Line, Inc. 141 Battery Street San Francisco, Calif.	e	x	x	x	x

	Name and Address of Member Co.	Group(s) *	AREA			
			So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
	80. Pacific Islands Transport Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x
	81. Pacific Oriental Terminal 351 California Street San Francisco, Calif.	h		x		
	82. Pacific Orient Express Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x
	83. Pacific Ports Service Co. 2 Pine Street San Francisco 11, Calif.	h	x	x		
[8]	84. Pacific Republics Line (Moore-McCormack Lines, Inc) 214 California Street San Francisco, Calif.	e	x	x	x	x
	85. Panama Pacific Line 141 Battery Street San Francisco, Calif.	h	x			
	86. Parr-Richmond Terminals 1 Drumm Street San Francisco, Calif.	g, h		x		

87.	Pope & Talbot, Inc. 100 Bush Street San Francisco, Calif.	b, g, h	x	x	x	x
88.	Portland Stevedoring Co. 1320 S. W. Broadway Portland, Oregon	g			x	
89.	Rothschild-International Stevedoring Co. 2247 East Marginal Way Seattle 4, Washington	g				x
90.	Rothschild's Alaska Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x
91.	Royal Mail Lines, Ltd. 1731 Exchange Bldg. Seattle 4, Washington	f	x	x	x	x
92.	Salmon Terminals Pier 24 North Seattle 4, Washington	h				x
93.	The San Francisco Steve. Co., Inc. 35 Brannan Street San Francisco 7, Calif.	g		x		
94.	Schirmer Steve. Co., Ltd. 55 Sacramento Street San Francisco, Calif.	g		x		
95.	Scrap Loaders, Inc. 3200 N. W. Yeon Avenue Portland 10, Oregon	g			x	

Exhibit 48

(Exh. 48, 8)

	Name and Address of Member Co.	Group(s) *	AREA: So. Calif.	No. Calif.	Oregon & Col. River	Washington
[9]	96. Seaboard Stevedoring Corp. 2 Pine Street San Francisco, Calif.	g	x	x		
	97. Seattle Bulk Loading Terminal, Inc. Pier 48 Seattle, Washington	g, h				x
	98. Seattle Stevedore Co. 2900 - 11th Avenue, S.W. Seattle 4, Washington	g, h				x
	99. C. F. Sharp & Co., Inc. Central Tower 703 Market Street San Francisco, Calif.	f	x	x		
	100. Shinnihon Steamship Co., Ltd. (Balfour, Guthrie & Co., Ltd., Agts.) 255 California Street San Francisco, Calif.	f	x	x	x	x
	101. Star Terminal Co., Inc. Pier 22 San Francisco, Calif.	h	x	x		
	102. States Marine Lines 241 Sansome Street San Francisco, Calif.	b, e	x	x	x	x

103.	States Steamship Company 320 California Street San Francisco, Calif.	e, h	x	x	x	x
104.	Stockton Bulk Terminal Co. of California 141 Battery Street San Francisco, Calif.	g		x		
105.	Stockton Stevedoring Co. P. O. Box 1793 Stockton, Calif.	g		x		
106.	Tacoma Stevedore & Terminal Co. P. O. Box 1157 Tacoma, Washington	g, h				x
107.	Tait Stevedoring Co., Inc. 2247 East Marginal Way Seattle 4, Washington	g				x
108.	Transpacific Trans. Co. 351 California Street San Francisco, Calif.	f	x	x	x	x
109.	Twin Harbor Stevedoring & Tug Co. P. O. Box 716 Hoquiam, Washington	g				x
110.	Union SS Co. of N. Z., Ltd. 230 California Street San Francisco, Calif.	f	x	x	x	x
111.	Washington Stevedoring Co. 36 West Stacy Street Seattle 4, Washington	g				x

Name and Address of Member Co.	Group(s) *	AREA			
		So. Calif.	No. Calif.	Oregon & Col. River	Wash-ington
112. West Coast Steamship Co. 601 Board of Trade Bldg. Portland 4, Oregon	e			x	
113. West Coast Terminals Co. of California 311 California Street San Francisco, Calif.	g, h	x	x		
114. Westfal-Larsen Co. Line (General SS Corp., Ltd., Agts.) 432 California Street San Francisco, Calif.	f	x	x	x	x
115. Westfall Stevedore Co. Foot of Washington Street P. O. Box 770 Eureka, Calif.	g		x		
116. Weyerhaeuser Steamship Co. 141 Battery Street San Francisco, Calif.	b	x	x	x	x
117. Willapa Harbor Steve. Co. Raymond, Washington	g				x
118. Williams, Dimond & Co. 530 W. 6th Street Los Angeles, Calif.	f, h	x	x	x	x

[11] 119.	Yerba Buena Corporation 55 Sacramento Street San Francisco, Calif.	g, h	x	
120.	Zidell Docks, Inc. 3121 S. W. Moody Street Portland 1, Oregon	g		x

GROUP(S)

a. Passenger Line Group
b. Intercoastal Line Group
c. Coastwise Group
d. Alaska Group
e. Offshore Group
f. Foreign Line Group
g. Stevedore Group
h. Terminal Group

MEMBERSHIP ROSTER FOR 1962

Exhibit 48

(Exh. 48, 11)

Exhibit 55

[1] PACIFIC MARITIME ASSOCIATION
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

March 16, 1961

MEMBERS:

REVISED PAYMENT PROCEDURES

ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND

On advice of counsel, a revision in payment procedures to the Association for Modernization and Improvement Fund purposes is required. Internal Revenue regulations provide that any contributions made for the benefit of employees for fringe benefits have to be made by the employers of such employees in order to guarantee deductibility of contributions. This concept was confirmed at a conference held by Association counsel with officials of the Internal Revenue Service in Washington, D. C. a short while ago.

In order to meet Internal Revenue requirements, it is necessary to modify the reporting and paying procedures of member companies to the Association for ILWU-PMA Modernization and Improvement Fund purposes, as follows:

1) Member Steamship Companies will report on the Association Declaration of Tonnage form, all tonnage handled during the preceding calendar month, broken down on a port basis, in the same manner as outlined in our letter of 2/3/61. This tonnage declaration form should be in the hands of the Association not later than the 20th of the month to cover tonnage handled during the preceding calendar month, which is in accordance with Association By-Law provisions.

2) The member steamship company will complete a Form MI-102 (sample of which is attached to this letter)

for each contracting stevedore loading or discharging cargoes for the member steamship company during the month in which such cargoes were handled. Two copies of Form MI-102 should be sent to the contracting stevedore involved in order that he may make payment of the contribution to the Association. Distribution of the form by the member steamship company will be as follows:

a) The green copy will be sent to the contracting stevedore, who will, in turn, transmit same to the Association together with a check to cover the amount of contribution due.

b) The yellow copy will be retained by the contracting stevedore for his file.

c) The white copy will be sent to the Association by the member steamship company with the regular monthly tonnage report.

d) The pink copy will also be sent to the Association, along with the white copy.

e) The blue copy is to be retained by the member steamship company for their file.

f) Separate advices should be completed for coastwise cargoes which are now assessable at half the regular rate for loading and half for discharging.

[2] 3) Form MI-102 made by member steamship companies to cover cargoes handled by each of their contractors on the Pacific Coast should equal the number of tons reported by the member steamship principal to the Association.

4) The contracting stevedore, immediately upon receipt of Form MI-102 from the steamship principal, will send to the Association the green copy together with a check payable to Pacific Maritime Association

to cover the amount of Modernization and Improvement Fund contribution. If a check is not received from the contracting stevedore within ten (10) days from the time the Association and the contracting stevedore receive copies of form MI-102, the steamship company will be advised of such non-payment. The Board of Directors request that steamship principals advance to their contractors sufficient monies with the remittance advice in order that the contractors may make payments promptly to the Association.

5) Association tonnage dues will be remitted directly to the Association by the steamship principal when submitting tonnage declaration form to the Association.

6) Contracting Stevedores reporting tonnages handled for account of non-member steamship companies will use exactly the same procedure enumerated in our letter of 2/3/61. The contracting stevedore should not include member companies' tonnages in stevedore cargo dues report as this would result in a duplication of tonnages already declared by the member steamship principal.

Association experience has been that during recent weeks some companies have submitted tonnage reports but have failed to make contribution to the Modernization and Improvement Fund in accordance with instructions issued by the Association on 2/3/61. We again wish to reiterate the fact that this contribution is a contractual commitment, exactly the same as welfare, pension and vacation contributions, and should be paid into the Association not later than the 20th of the month following the month in which such tonnages were handled. This is in accordance with action taken by the Board of Directors on January 16, 1961.

Exhibit 55

Prompt reporting of tonnage and payment of contributions is essential in order that Association staff and Directors may have up-to-date information to determine whether the contribution rate is adequate to meet our $5 million commitment during the year 1961. Information from tonnage declarations will also be needed in connection with other aspects of our agreement with the ILWU of October 18, 1960. Your cooperation, therefore, in submitting reports and making payments promptly will be appreciated.

The foregoing procedures were approved by the Board of Directors on March 9, 1961.

K. F. SAYSETTE,
Vice President & Treasurer.

KFS:IM

Attachment

(Exh. 55, 1 of Att.)

Exhibit 55

[1] MONTHLY REPORT OF ASSESSABLE TONNAGE
ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND

For month of ....., 19....

FOLLOWING IS ALL TONNAGE HANDLED DURING THE MONTH INDICATED BY ..... FOR OUR ACCOUNT AND THE CONTRIBUTION
Contracting Stevedore
DUE THEREON TO THE ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND:

	Tons	Rate	Amount
GENERAL CARGO, LUMBER and LOGS ..			
BULK DRY CARGO			
		TOTAL	

TOTAL TONNAGES SHOWN ABOVE ARE AS REPORTED TO THE PACIFIC MARITIME ASSOCIATION FOR CARGO DUES PURPOSES ON THE MONTHLY REPORT OF TONNAGE AND ARE UNDERSTOOD TO BE SUBJECT TO SUCH INDEPENDENT AUDIT PROCEDURES AS MAY BE DETERMINED BY THE BOARD OF DIRECTORS OF THE PACIFIC MARITIME ASSOCIATION.

_____
Company

_____ _____
Authorized Signature Date

INSTRUCTIONS TO MEMBER SHIPPING COMPANIES AND AGENTS

1. Prepare one Form MI-102 for each contracting stevedore. Total tons on all Forms MI-102 should agree with total tons on monthly report of tonnage for cargo dues.
2. Attach white and pink copies of this form to the monthly report of tonnage when submitting the latter to P.M.A. Do not remit the modernization and improvement fund assessment to P.M.A. Remit only the cargo dues.

INSTRUCTIONS TO CONTRACTING STEVEDORES

1. Upon receipt of yellow and green copies from the member shipping company or agent, prepare remittance for the total assessment shown above made payable to Pacific Maritime Association and forward with green copy no later than the 20th day of month following the covered month to: K. F. Saysette, Vice President and Treasurer, Pacific Maritime Association, San Francisco 11, Calif.

Exhibit 55

3. Mail yellow and green copies to contracting stevedore in sufficient time for the contractor to have his remittance in the hands of P.M.A. by the 20th day of the month following the covered month.
4. Retain blue copy for your files.

2. Retain yellow copy for your files.

THIS IS A FIVE PART FORM

Green	—To contracting stevedore for transmittal to PMA with remittance
Yellow	—To contracting stevedore for file
White	—To PMA with regular monthly report of tonnage for cargo dues
Pink	—Same as white copy above
Blue	—Originating Company's file

Exhibit 56

[1] Pacific Maritime Association
16 California Street
Phone DOuglas 2-7973
San Francisco 11, Cal.

December 14, 1961.

Members:

Modernization and Improvement Fund Assessments

At a meeting of the Board of Directors of the Association held on December 13, 1961, resolutions were adopted having the following effect:

Ship Clerks' Assessment

A Fund contribution of 15¢ per man hour be paid on all ship clerk hours effective *8:00 A.M., December 18, 1961.* The contribution is to be paid through the Central Records Offices in the same manner as the Pension, Welfare, Vacation and other hourly assessments. It will apply to hourly and monthly clerks.

Tonnage Assessment

As a result of the hourly contribution on clerks mentioned above, the present tonnage contribution on general cargo, lumber, logs and automobiles is reduced from 27½¢ per ton to 24½¢ per ton and from 5½¢ to 5¢ per ton on bulk dry cargo. The change is to be effective with all loading and discharging operations commencing in any Pacific Coast port on and after *8:00 A.M., December 18, 1961.* The present method of paying the tonnage assessment will remain in effect.

Walking Bosses and Foremen's Assessment

A new contribution of 4¢ per ton is to be made to a Walking Bosses' and Foremen's Mechanization

Exhibit 56

Fund. The contribution will apply on general cargo, lumber, logs, and automobiles and will become effective on all loading and discharging operations commencing in any Pacific Coast port on and after *8:00 A.M., December 18, 1961.* (This contribution would normally be 2¢ per ton. The double rate is to run only until uncollected contributions due for 1961 have been made up.) The manner of payment will be the same as that employed for the present Mechanization Tonnage assessment.

The above items were adopted by the Board of Directors on the recommendation of the Funding Committee to meet certain legal requirements inherent in the plan. They are subject to review no later than March 15, 1962.

Additional details respecting the exact method of reporting and paying tonnage assessments under these revisions will be provided within the next few days. Your cooperation in complying with the new requirements will be appreciated.

K. F. SAYSETTE,
Vice President & Treasurer.

KFS:IM

Complainant's Proposed Findings of Fact and Conclusions of Law

[1a] (Filed June 24, 1963)

Findings of Fact

1. Complainant is a corporation organized under the laws of the Federal Republic of Germany. It manufactures automobiles in the said Federal Republic, and it exports part of its production to the United States.

2. Respondents, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), are corporations organized under the laws of the State of Nevada. They are engaged in the business of furnishing stevedoring and terminal services and facilities at San Francisco and Long Beach, California, respectively.

3. Intervenor is a non-profit organization organized under the laws of the State of California. Its membership includes respondents and consists of companies engaged in the operation of vessels from and to, and the furnishing of stevedoring and terminal services facilities in, ports located along the United States Pacific Coast between Canada and Mexico. Intervenor negotiates and administers collective bargaining agreements with labor unions representing employees of its members.

4. The by-laws of intervenor provide for the election of twenty-one directors comprising at least thirteen representatives of shipping lines and at least four representatives of stevedoring firms and terminal operators. The remaining four members are elected on an area basis. Intervenor's by-laws further contain provisions for voting at membership meetings which result in a majority of the votes being held by liner interests and a minority of the votes being held by stevedoring and terminal operator interests. As a result, liner interests dominate over

[2a] stevedoring and terminal operator interests both in the Board of Directors and in membership meetings of intervenor.

5. Complainant causes a substantial number of the automobiles manufactured by it to be shipped to ports on the United States Pacific Coast. It is by far the largest shipper of automobiles to these ports. The total number of Volkswagen vehicles discharged on the United States Pacific Coast was 41,968 in 1962 and 38,474 in 1961.

6. These shipments of Volkswagen vehicles to the United States Pacific Coast are made preponderantly on vessels chartered by complainant, and complainant arranges directly at its own expense with stevedores and terminal operators for the discharge of these vessels. The number of complainant's vehicles carried to the United States Pacific Coast on vessels chartered by complainant was 28,296 in 1962 and 29,111 in 1961.

7. By reason of these shipments complainant is the largest shipper using chartered vessels for transportation to the United States Pacific Coast.

8. In addition to the vehicles transported on chartered vessels, complainant also ships a large volume of its vehicles to the United States on liner vessels. The volume of these liner shipments was 13,672 units in 1962 and 9,363 units in 1961. Arrangements for the discharge of these vehicles are made with stevedoring firms and terminal operators by and at the expense of the lines; and the freight charges by these lines to complainant include the expense of such discharge as a cost element.

Complainant's Proposed Findings of Fact and Conclusions of Law

9. Since 1954, respondents have respectively supplied all stevedoring and terminal services and facilities required for discharge of those of complainant's vehicles which have [3a] been shipped on chartered vessels to the ports of San Francisco and Long Beach, California. Since 1954, respondents have also furnished stevedoring and terminal services and facilities to common carriers by water in connection with the discharge of complainant's vehicles at the said ports. Respondents further have acted as stevedoring and terminal contractors for common carriers by water in the discharge at the said ports respectively of automobiles not manufactured and not owned by complainant.

10. The services which respondents have rendered to complainant in connection with charter shipments and similarly to common carriers in the discharge of vehicles include the unlashing and unchecking, the discharge from ship to pier, the removal from shipside to storage area, sorting, storage and delivery of such vehicles.

11. In connection with these operations, respondents have made available to complainant and to the said common carriers the use of piers and of storage areas which respondents occupy pursuant to arrangements with port authorities and which respondents are required to and do clean, light, heat, maintain and provide with guard service.

12. In connection with the operations referred to in Finding 10, respondents have supplied such equipment as is usually required for stevedoring and terminal services, including a special patent bridle device or gear to pick vehicles up from the hold, tractors to either push or pull vehicles from shipside to storage areas and special hooks needed to connect the vehicles with such tractors.

Complainant's Proposed Findings of Fact and Conclusions of Law

13. In return for all services and facilities referred to in Findings 10 to 12, respondents charge complainant at the fixed rate of $10.45 per vehicle, irrespective of the measurement or weight thereof.

[4a] 14. Respondents render services and furnish facilities similar to those referred to in Findings 10 to 12 to common carriers by water in the handling of automobiles and other types of cargo. Such transactions with common carriers represent about ninety percent of respondents' business.

15. On behalf of its members, intervenor negotiates and administers, among others, collective bargaining agreements with International Longshoremen's and Warehousemen's Union ("ILWU"), the certified collective bargaining representative of longshoremen on the Pacific coast between the Canadian and the Mexican borders. These agreements cover, among other things, wages and practices for all work done on behalf of intervenor's members in the loading, discharge and terminal handling of cargo shipped from and to ports in the said area.

16. On or about August 10, 1959, intervenor and ILWU executed a "Memorandum of Understanding" providing, among other things, for the creation of a special fund, in the amount of $1,500,000, for the benefit of ILWU's members to be accumulated through employer contributions during a period of twelve months following execution of the said Memorandum. In return for the obligation to accumulate this amount, the employers were given, in the Memorandum of Understanding, certain concessions by ILWU with respect to work practices.

Complainant's Proposed Findings of Fact and Conclusions of Law

17. On or about October 18, 1960, intervenor and ILWU executed a "Memorandum of Agreement" containing further substantial concessions by ILWU to the employers with respect to work practices. In return for these concessions, intervenor undertook, among other things, that the $1,500,000 accumulated pursuant to the August 10, 1959 Memorandum of Understanding, together with a further amount of $27,500,000 to be raised by employer contributions of $5,000,000 a year over a period of five and one-half [5a] years, should be contributed to a jointly trusted Fund. The Memorandum of Agreement provided for the disbursement of this Fund so as to guarantee to the employees represented by the ILWU certain specified hours of straight time pay and so as to provide them further with certain retirement and death benefits.

18. On or about November 15, 1961, but as of January 1, 1961, intervenor and ILWU executed an instrument designated as "ILWU-PMA Supplemental Agreement on Mechanization and Modernization" providing in more detail for the creation, management and disposition of the $29,000,000 Fund required by the Memorandum of Agreement of October 18, 1960.

19. The agreements between intervenor and ILWU referred to in Findings 16, 17 and 18 at all times left to intervenor the free determination, without any interference from ILWU, of the methods through which the Fund required by these agreements was to be raised.

20. During the twelve month period following execution of the Memorandum of Understanding of August 10, 1959, intervenor raised the required amount of $1,500,000 through contributions from its members on the basis of the number of manhours of ILWU labor used by each of them.

Complainant's Proposed Findings of Fact and Conclusions of Law

21. Shortly after the execution of the Memorandum of Agreement of October 18, 1960, intervenor created a Committee to advise on methods for the raising of the further amount of $27,500,000 required by the said instrument. All of the members of the Committee were representatives of liner interests. The Committee submitted on or about January 4, 1961 a written report recommending that the $27,500,000 be raised by an assessment on stevedoring and terminal operator members based upon revenue tons handled by them, with bulk cargo being counted only at one-fifth of the value of general cargo. The report further [6a] recommended that cargo was to be treated on a weight or measurement basis depending upon how it was manifested. The report advised future review of the assessment formula with respect to possible hardship cases and inequities.

22. At a meeting of the membership of intervenor on January 10, 1961, the revenue ton assessment formula recommended by the Committee was adopted by a vote of 246 out of 341. At the same meeting the Memorandum of Agreement of October 18, 1960 was ratified by the membership.

23. On January 16, 1961, intervenor's Board of Directors adopted a resolution for the assessment at a rate of twenty-seven and one-half cents per ton for general cargo and of five and one-half cents per ton for bulk cargo in accordance with the membership resolution of January 10, 1961. This decision of the Board of Directors deviated from the resolution of the January 10, 1961 membership meeting, among other things, in providing that scrap metal should be treated as bulk cargo rather than as general cargo and further in providing that tonnage should be determined for purposes of the assessment in accordance with the manner in which cargo had been manifested during

the year 1959, without consideration of any possible change in method of manifesting occurring since then. The impact of the assessment upon automobiles was specifically considered by intervenor's Board of Directors during the course of this meeting.

24. At its meeting on January 16, 1961, intervenor's Board of Directors decided to create a new Committee to advise on possible changes in the method of raising the Fund required by the October 18, 1960 Memorandum of Agreement. All of the members appointed to this Committee were representatives of liner interests.

[7a] 25. This new Committee considered, from time to time, requests and proposals for changes in the method of raising the Fund required by the Memorandum of Agreement of October 18, 1960. The Committee recommended that no changes be made in favor of transshipped cargo, rice in containers and bananas. It did, however, recommend certain changes in favor of the United States Army and in favor of coastwise trade.

26. These recommendations in favor of the United States Army and of the coastwise trade were adopted by intervenor's Board of Directors on March 8, 1961. As to coastwise trade, it was decided that the assessment should be reduced to one-half. This reduction was recommended by the Committee on the ground that coastwise trade was "a very marginal business economically."

27. By resolution of intervenor's Board of Directors adopted on July 3, 1962, the tonnage assessment on certain shipments of lumber in coastwise trade, already reduced to one-half by the resolution of March 8, 1961, was further reduced to two and one-half cents, less than one-tenth of

the assessment on general cargo in trades other than coastwise transportation. By a further resolution of intervenor's Board of Directors adopted on December 12, 1962, the tonnage assessment on certain other shipments of lumber in coastwise trade was reduced to the same amount. Both reductions were made effective as of January 1, 1961. The reductions were ostensibly made on the ground that the lumber shipments so favored were already subject to certain penalty wage rates; but the reductions were continued in effect although the penalty wage rates were subsequently abolished. The true reason for these reductions was to strengthen the position of carriers who were members of intervenor in their competition with outsiders.

28. As of December 18, 1961, intervenor's Board of Directors reduced the tonnage assessment on general cargo, [8a] lumber, logs and automobiles to twenty-four and one-half cents, but added a further tonnage assessment of four cents for a new Walking Bosses' and Foremen's Mechanization Fund and an assessment of fifteen cents per manhour on certain clerical work performed in terminal operations.

29. From at least March 3, 1961 to at least October 24, 1961, oral and written communications were had at meetings of committees of intervenor, among intervenor's staff and its President and between intervenor and ILWU tending to impose the tonnage assessment through union coercion upon employers not members of intervenor with the goal of thereby reducing the financial obligations of intervenor's members with respect to the Fund.

30. Complainant manufactures and ships to the United States Pacific Coast two different lines of vehicles. One of these, the passenger line, consists of the sedan, the sunroof sedan, the convertible and the Karmann-Ghia. The

vehicles in this group have an average weight of 1,643 pounds per unit equal to about eight-tenths of a weight ton and an average measurement of 7.8 cubic tons. The other line consists of station wagons, pick-up trucks, panel trucks and other commercial vehicles and is referred to as the "transporter line." Vehicles in this line average a weight of 2,193 pounds equivalent to about 1.1 weight tons. They measure in the average 456 cubic feet corresponding to 11.4 measurement tons.

31. In the approximate ratio between passenger cars and transporters actually shipped by complainant to the United States Pacific Coast, an average vehicle would have a weight of about 0.9 tons and a measurement of about 8.7 tons. Accordingly, a revenue tonnage assessment on complainant's vehicles would be about ten times as high on a measurement basis, if a constant rate per ton were applied, as on a weight basis.

[9a] 32. Through an assessment on a measurement basis the total cost of the discharge of complainant's vehicles at United States Pacific Coast ports would be increased by about 26 percent while the average increase of the cost of discharge of all general cargo through intervenor's Fund assessment would amount to only about 2.2 percent.

33. An assessment on a measurement ton basis on automobiles would amount to a sum equal to about 58 percent of the total direct labor cost, without fringe benefits, involved in the discharge thereof. The total Fund assessments levied by intervenor against its members represent only about five percent of total direct labor cost of these members without fringe benefits.

Complainant's Proposed Findings of Fact and Conclusions of Law

34. Compared with either the total cost of discharge or the total direct labor cost involved in discharge, a measurement ton assessment would burden automobiles about ten times as much as a revenue ton assessment at the same rate burdens general cargo in the average.

35. No commodity is burdened as heavily through the Fund assessment, in proportion to total discharge cost and total direct labor involved in discharge, as automobiles. The cargo classifications bearing the next highest burden pay on a weight basis about one-third less than automobiles and involve types of cargo loaded and unloaded at the United States Pacific Coast in small volume, but requiring much more labor for stevedoring, and terminal handling than automobiles.

36. On January 17, 1961, the day after the meeting of intervenor's Board of Directors referred to in Finding 23, at which the impact of the assessment upon automobiles had been discussed, a written protest against the assessment of automobiles on a measurement basis was submitted to intervenor on behalf of complainant.

[10a] 37. Following this written protest intervenor's Vice President and Treasurer issued on behalf of intervenor, but without authority, a ruling to the effect that the assessment on automobiles should be made in all cases on a measurement basis. This ruling purported to introduce, as to automobiles, a practice different from that used as to all other cargo, inasmuch as all other cargo was treated according to the way in which it had been manifested in 1959. This unauthorized ruling was precipitated by the fact that complainant uses to a large extent chartered vessels, thus withdrawing business from the liner interests dominating intervenor.

Complainant's Proposed Findings of Fact and Conclusions of Law

38. Protests on behalf of complainant were reviewed from time to time by intervenor's Committee. This resulted in the recommendation that, while all other cargo should be handled as manifested in 1959, automobiles should be burdened with the measurement ton assessment regardless of how manifested.

39. Numerous other protests on behalf of complainant and others against the measurement ton assessment of automobiles were unsuccessful, although remedial action was considered at various times by various persons and groups on behalf of intervenor.

40. The practices as to whether a specific type of cargo is manifested by weight or by measurement vary to a substantial extent from one trade to another and from one carrier to another. Intervenor, nevertheless, levies the Fund assessment for all types of cargo other than automobiles according to the manner in which such cargo happened to be manifested in 1959.

41. There was not in 1959 and there is not at this time any uniform practice with respect to the manifesting of automobiles, except that automobiles were at all times and are manifested and freighted in the inter-coastal and [11a] coastwise trade consistently on a weight basis and except that liner shipments of complainant's vehicles and other automobiles were and are manifested and freighted most frequently on the basis of the number of units, with an additional indication of weight and, in some instances, of measurement.

42. The treatment of automobiles by intervenor for purposes of Fund assessments cannot be sought to be justified by the existence of any prior consistent industry

pattern dealing with this type of cargo on a measurement basis.

43. A measurement assessment on automobiles is particularly inappropriate with respect to stevedoring and terminal operations because measurement of vehicles has no significant relation to the amount of labor required in the handling of automobiles.

44. Intervenor's Fund assessment has an impact on automobiles about ten times as great as upon average general cargo and about one hundred times as great as upon lumber in coastwise trade.

45. The discharge of automobiles in general and of complainant's automobiles in particular at United States Pacific Coast ports was not benefited more, and was probably benefited less, than the discharge of general cargo in the average by the concessions which ILWU made in return for the creation of the Fund.

46. The economic effect of intervenor's attempted measurement ton assessment on automobiles is to burden the stevedoring and terminal handling of automobiles with substantial expenses which actually relate to the stevedoring and terminal handling of other types of cargo and which are in any event wholly unrelated to the services in connection with which they are sought to be exacted.

[12a] 47. Since the institution of the Fund assessment by intervenor, respondents have from time to time attempted to collect from complainant, in connection with stevedoring and terminal services and facilities supplied in the discharge of vessels chartered by complainant, and in addition to the compensation for such services and facili-

ties agreed upon between complainant and respondents, amounts equal to those assessed by intervenor on a measurement basis with respect to complainant's vehicles.

48. Complainant has at all times refused to pay these assessments, but has paid to respondents, in addition to the agreed compensation for services and facilities, amounts equal to the manhour assessments referred to in Finding 28.

49. On or about August 14, 1962, intervenor instituted an action against respondents in the United States District Court for the Northern District of California, Southern Division, to recover from respondents the measurement ton assessments with respect to complainant's automobiles. In this action, respondents impleaded complainant in order to recover from complainant the amounts which intervenor sought to recover from respondents. Thereafter, by order dated November 29, 1962 and amended December 11, 1962, the United States District Court granted complainant's motion to stay the said action pending submission to and determination by the Federal Maritime Commission, or by a court of last resort upon appeal from such Commission action, of the issue as to whether the measurement ton assessment as applied to complainant's automobiles violates sections 15, 16 or 17 of the Shipping Act, 1916. Complainant thereupon instituted the present proceeding.

Conclusions of Law

[13a] 1. Respondents are other persons subject to the Shipping Act, 1916, as defined in section 1 thereof.

2. Most of the other members of intervenor are either common carriers by water or other persons subject to the Shipping Act, 1916, as defined in section 1 thereof.

Complainant's Proposed Findings of Fact and Conclusions of Law

3. The arrangements made by intervenor with the participation of respondents and of other members of intervenor for the assessment of cargo for purposes of the Fund to be created in accordance with the agreements referred to in Findings 17 and 18 are cooperative working arrangements among carriers by water and other persons subject to the Shipping Act, 1916, fixing and regulating rates for stevedoring and terminal services and facilities and controlling and regulating competition within the meaning of section 15 of the Shipping Act, 1916.

4. The said arrangements have not been filed with or approved by the Federal Maritime Commission as required by section 15 of the Shipping Act, 1916. In accordance with the said provision, these arrangements and any action tending to carry them out, in whole or in part, directly or indirectly, are unlawful.

5. The assessment by intervenor of automobiles, at a rate applied per revenue ton on other general cargo, on the basis of measurement rather than weight, brought about collectively by respondents, by intervenor, by common carriers by water and by other persons subject to the Shipping Act, 1916, subjects automobiles, including complainant's automobiles, to undue and unreasonable prejudice and disadvantage within the meaning of section 16 of the Shipping Act, 1916.

[14a] 6. The assessment of automobiles on a measurement ton basis by intervenor and the attempted collection of such assessments by respondents are unjust and unreasonable practices by carriers by water and other persons subject to the Shipping Act, 1916, within the meaning of section 17 of the said Act.

Complainant's Proposed Findings of Fact and Conclusions of Law

7. In a system of assessments, in which other classifications of cargo are subjected to a levy per manifested ton at a uniform rate, it would be a just and reasonable practice for intervenor and respondents to apply the same rate to automobiles on the basis of weight.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing via first-class mail, postage prepaid, a copy to the attorneys for each such party in sufficient time to reach them on the date said document is due to be filed with the Board.

Dated at New York, New York, this 21st day of June, 1963.

WALTER HERZFELD,
FOR PILLSBURY, MADISON & SUTRO,

and

HERZFELD & RUBIN,
Attorneys for Complainant.

Initial Decision of Benjamin A. Theeman, Examiner [1]

(Filed June 5, 1964)

[1] FEDERAL MARITIME COMMISSION

[SAME TITLE]

Members of the Pacific Maritime Association who are common carriers and other persons subject to the Act including Respondents found to have entered as such members into a cooperative working arrangement whose aims and purposes were to establish a method of assessing and collecting contributions to pay their obligation under an agreement with the International Longshoremen's and Warehousemen's Union. The cooperative working arrangement found not to be within the purview of Section 15 of the Act in that it does not deal with (1) ocean transportation; (2) fixing or regulating transportation rates or fares; (3) giving or receiving special rates, accommodations, or other special privileges or advantages; (4) controlling, regulating, preventing or destroying competition; (5) pooling or apportioning earnings, losses, or traffic; (6) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or (7) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried.

Respondents having included the assessment in its entirety in their rate to Volkswagen for discharging automobiles

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[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224 and 502.228.

found not to have violated Sections 16 and 17 of the Act. Complaint dismissed.

STANLEY S. MADDEN and WALTER HERZFELD, attorneys for Volkswagenwerk Aktiengesellschaft, complainant.

BRYANT K. ZIMMERMAN, attorney for Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), respondents.

EDWARD D. RANSOM and GARY J. TORRE, attorneys for Pacific Maritime Association, intervener.

This proceeding arises out of a complaint filed by Volkswagenwerk Aktiengesellschaft (Volkswagen) involving the payment of certain costs [2] charged by Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), hereinafter referred to collectively as "Respondents" for services rendered by Respondents to Volkswagen in the discharging the latter's automobiles (VW's) at Respondents' terminals in San Francisco and Los Angeles.

Volkswagen brings to the U. S. about 40,000 VW's annually through the Pacific ports. Respondents are contracting stevedores and terminal operators and as such are members of Pacific Maritime Association (Intervener or PMA). PMA is a corporation organized for the purpose of representing its members in collective bargaining with unions. Longshoremen and marine clerks employed by PMA members are members of the International Longshoremen's and Warehousemen's Union (ILWU). PMA and ILWU established a Mechanization and Modernization Fund herein called the "Mech Fund" whereby PMA members agreed to establish a trust fund for the benefit of employees in the sum of $29,000,000 over a period of five and one half years beginning January 16, 1961. To procure this sum PMA, under a resolution approved by its members

and Board of Directors, assessed its members for contributions on a tonnage of cargo handled basis. Shortly thereafter, Respondents charged the amount of the assessment on automobiles (hereafter referred to as "Mech Fund charge") to Volkswagen as part of the cost of discharging VW's.

Volkswagen refused and continues to refuse to pay so much of the discharge rate as represents the Mech Fund charge claiming it is too high, and its inclusion in the cost of discharge was improper under the Shipping Act of 1916, as amended (hereinafter called "the Act"). Respondents, thereafter, refused to pay the equivalent amount as a Mech Fund contribution to PMA.

PMA filed a libel against Respondents in the United States District Court for the Northern District of California, Southern Division demanding payment of unpaid Mech Fund contributions from each Respondent as a PMA member. By Respondents' interpleader, Volkswagen was made a party [3] to the Court action. Upon Volkswagen's request the Court stayed the proceedings therein pending submission of the following issues to the Commission for determination:

> 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U. S. C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
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> 2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the

the respective ports and are clearly "other persons" subject to the Act.[5]

3. *Pacific Maritime Association* was organized in 1949 as a non-profit corporation with power to negotiate and administer labor contracts with offshore and onshore unions on behalf of its members. PMA membership consists of and is open to carriers (domestic and foreign), marine terminal operators, and stevedore contractors in the various ports of the Pacific Coast. Collective bargaining occurs within a unit defined by the National Labor Relations Board as to longshore functions, i.e., work of longshoremen and marine clerks. This proceeding deals only with longshore functions, wherein the ILWU, for collective bargaining purposes, is certified to represent the longshoremen and marine clerks employed by the marine terminal operator and stevedore contractor members of PMA.[6]

Article IV of the by-laws of PMA provides for a division of the membership into 8 groups of similar interests, among other reasons, for the purposes of representation on the Board of Directors. Article I vests all power in a Board of 21 Directors who are selected from the groups above mentioned in a manner and in the proportion set forth in the By-laws.

Article XIII provides that the members shall "pay such dues and assessments as shall be fixed and levied by the Board of Directors . . .". One such is "Cargo Dues" which may be measured by (1) each ton of cargo loaded or discharged at U. S. Pacific Coast ports by or for mem-

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[5] See page 26.

[6] Under similar circumstances collective bargaining occurs between PMA and ILWU for seamen employed by the carriers under a master contract also certified by the Labor Board for a unit embracing American flag vessels headquartered on the Pacific Coast.

bers or for non-members; and (2) the man hours performed by employees of the members under the terms of the ILWU agreements. The Board of Directors, in establishing "Cargo Dues" may use either or a [6] combination of these bases. Section 2, Article XIII provides that, "In fixing and levying that portion of the cargo dues according to tonnage handled, the Board . . . may establish different rates per ton, or other measurement unit applicable to different loading or discharging handling conditions," and "shall . . . fix rules for calculation of the tonnage or other measurement units loaded, discharged, and/or handled, by or for members . . .". The Board of Directors' determinations "in respect to all of the matters specified in this Section shall be final and conclusive."

Article XI, Section 2 provides that a contract with a union, or one imposing personal liability on the members must first be approved by a vote of members holding a majority of the voting power of the entire membership. Section 3 provides that a member who has not authorized or accepted in writing such contract and who has not voted in favor of its approval may avoid all obligation thereunder by resigning from PMA within seven days after the vote on such contract. But after a member is bound it must abide by its obligations or be subject to certain penalties including liquidated damages.

It is claimed by no party that PMA is subject to the Act. Nor is there any evidence to show that PMA engages in any of the activities contemplated by the Act. On the other hand, there is no question that many PMA members are subject to the Act, being common carriers by water, and organizations engaged in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

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B. NEGOTIATIONS FOR AND ESTABLISHMENT OF THE MECHANIZATION AND MODERNIZATION FUND.

1. In 1957, ILWU and PMA started bargaining and negotiating with regard to the mechanization and utilization of labor saving devices in connection with the work of cargo-handling for the mutual benefit of the work force and the employers. This meant (1) on the part of ILWU, [7] to permit to employers the unhindered introduction and maintenance of labor saving devices, and the efficient operation of the workers; and (2) on the part of PMA (i.e. PMA members who employed longshoremen), to share with the workers resultant savings in wage costs, and to assure that the change in work methods would create no unsafe working conditions, or result in a "speed up" of the individual worker.

2. On August 10, 1959, as a result of continued collective bargaining, an agreement was executed which provided among other things, that additional time, not to exceed one year from June 15, 1959, was needed for study and additional experience in connection with mechanization. Within this period, PMA agreed that it would create a fund of $1½ million for the benefit of the work force. The agreement did not specify how PMA was to raise this sum but the sum was accumulated by PMA assessing its members on a man hour basis.[7]

3. Further negotiation gave rise on October 18, 1960, to a "Memorandum of Agreement on Mechanization and Modernization". The details of this agreement are not pertinent to this proceeding. It suffices our purpose that the agreement furthered the goal of ILWU and PMA to establish certain benefits for the working force to be paid

[7] See Article XIII of the PMA By-laws, above.

out of a $29,000,000 trust fund to be established by PMA. To be included in this fund was the $1½ million already mentioned, the remainder was to be accumulated over a five and one-half year period at the rate of $5,000,000 per year. The agreement was effective upon ratification by the ILWU and PMA and was to expire on July 1, 1966.

4. The Mech Fund plan contemplated that the members of PMA in the bargaining unit commit themselves individually and severally to the payment of the fund. In light of this, ILWU agreed that the method of collection of the fund from the PMA membership was to be reserved to PMA. In November 1960, Mr. St. Sure, President of PMA, appointed a [8] six man Committee on Work Improvement Fund to determine and recommend a method of assessment to the Board of Directors and the PMA membership.[8]

5. During January, 1961, the Board of Directors and the PMA membership adopted the method of raising the Mech Fund contained in the majority report of the Work Improvement Fund Committee and approved the Agreement with ILWU.

6. On November 15, 1961, the Mech Fund in its final form was established by PMA and ILWU when they executed a "Supplemental Agreement" effective January 1, 1961. The parties to the agreement are the ILWU and its locals representing certain longshoremen and marine clerks, hereinafter referred to as "Employees" and the PMA representing contracting-employers, including some steamship

[8] The decision of this committee and the ensuing events in PMA gave rise to the Volkswagen complaint herein. This aspect of the proceeding is dealt with more fully in paragraphs 15 through 39 below.

Shipping Act, 1916, as amended, 46 U. S. C. 815 (1961).

3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U. S. C. 816 (1961).

Thereafter Volkswagen filed the complaint in this proceeding alleging that Respondents, other PMA members and PMA had conspired or agreed to impose an extra charge on Volkswagen for terminal services in discharging VW's in violation of Sections 15, 16 and 17 of the Act. PMA was permitted to intervene.

A. Parties to the Proceeding

1. *Volkswagen* is a corporation of the Federal Republic of Germany. It manufactures automobiles there and exports a number of them to the United States. In 1961, Volkswagen imported through U. S. Pacific ports 38,474 VW's. Of these, 29,111 or about 75% were transported in vessels chartered by Volkswagen; the remainder of 9,363 were transported by common carrier. In 1962, 41,968 VW's were shipped to the Pacific Coast; 28,296, or about 70% on chartered vessels and the remainder, 13,672 on common carriers. During these years, VW's represented the largest number of automobiles imported through U. S. Pacific Coast ports; and the volume of Volkswagen's charter shipment to those ports was greater than that of any other dry cargo charter-shipment.

[4] 2. *Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles)* are engaged in business as contracting stevedores and ocean terminal operators in San Francisco and Long Beach.[2] The work is done for common carriers and contract carriers and all forms

of marine transportation, both by vessel or barge. About 90% of their business is for common carriers, 10% for contract carriers. Respondents are members of the Pacific Maritime Association, the Intervener herein. Respectively, they are members of the San Francisco Bay Carloading Conference, approved by the Federal Maritime Commission on June 10, 1946 under Agreement 7544, and the Southern California Carloaders Association, approved June 25, 1946 under Agreement 75[illegible]h of which have filed conference agreements approved under section 15 of the Shipping Act, as amended.[3]

Since 1954, Respondents have discharged VW's in San Francisco and Long Beach brought by chartered vessels [4] and common carriers. They have also discharged other makes of automobiles, government vehicles and other general cargo. The stevedoring operation in the California ports takes in movement of the cargo from a point of rest aboard the vessel to point of rest in storage and vice versa. In addition to stevedoring, Respondents provide clerking, sorting, and checking and storage services. In San Francisco and Long Beach, Respondents occupy piers under an arrangement with the respective port authorities and are obligated to provide light, heat, cleaning and general maintenance, including watchmen. As more fully discussed hereafter, Respondents operate terminal [5] facilities in

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[2] The operations at both places are similar. For the purpose of this decision the Respondents will be considered collectively.

[3] There is testimony that Respondents are members of an organization known as Stevedoring Contractors of the Pacific Coast formed in 1962 and approved by the Commission. The Commission's records do not reveal this information.

[4] Since 1960, Volkswagen is the only charter carrier of automobiles to these ports.

lines and terminal operators [9] who employ employees directly and the steamship lines [9] who contract with Employers to move and handle cargo. The Supplemental Agreement provided for the collection and establishment of three trusts totalling $29,000,000 as an obligation of the PMA members with exclusive power reserved to PMA, "to adopt and change the method, manner and amount of collecting" contributions from its member companies. PMA was designated the collecting agent of the Employers and was to act as a conduit for the passing of funds to these trusts. All payments to the fund by the Employers and by PMA to the Trusts are final and irrevocable. None but Employees, or their beneficiaries, are entitled to the benefits set forth in the Agreements.

7. For the period from January 16, 1961 when payments to the fund started, through December 31, 1962 approximately $10,000,000 had been paid into the fund over and above the $1½ million dollars previously [9] collected. About $130,000 remains unpaid by the stevedore companies handling VW's.

C. For Years Prior to the Mech Fund PMA Members Reported and Paid Tonnage Dues without objection.

8. Since at least 1958, Respondents, and other PMA members (stevedoring contractors, terminal operators or common carriers) paid cargo or tonnage dues to PMA [10] as instructed and assessed by PMA on about 600 items of cargo handled. Customarily the amount of this payment was included in the rate charged the carrier or if it was a chartered vessel to the cargo.

[9] These may be members or non-members of PMA.

[10] See Article XIII of the PMA By-laws, supra.

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9. Since at least 1958 Respondents[11] reported and paid their tonnage dues assessment on automobiles including VW's on a measurement ton basis.

10. Since at least 1958, Volkswagen shipped its VW's to U. S. Pacific Coast ports on charter carrier or common carrier as unboxed vehicles. Whether the automobile was a sedan, convertible, transporter, or Karmann-Ghia, each was considered a unit for discharging purposes, though the weight and cubic content of each type varied from the other.

11. The discharge rate for VW's transported by charter was negotiated on a unit basis between Respondents and Volkswagen and was known as the "unit price". It was established upon a kind of "cost plus" basis, wherein labor involved in the discharge of the VW's was broken down into various components and the cost for each phase determined. These costs, plus other items, such as overhead and profit yielded the rate. One of the items making up the "unit price" was the amount of the assessment for tonnage dues.

12. Admittedly, Volkswagen was aware that the tonnage dues item was included in the rate; that for automobiles the amount of the assessment [10] was computed on a measurement ton basis; and that Respondents paid tonnage dues to PMA on that basis.

13. The record is not clear as to how the VW's and other automobiles were shipped via common carrier. Generally they were transported on a unit basis but the

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[11] At all times here involved, automobiles were considered measurement cargo in foreign commerce; were transported on a weight basis in the coastal and intercoastal trades; were freighted on a unit basis by some carriers, i.e., a lump sum for a particular car or model, and particularly by Volkswagen in its charter arrangements.

measurement and weight were shown on the manifest. In any event, the charge for stevedoring to the carrier was on a measurement ton basis and tonnage dues to PMA were reported and paid on that basis.

14. Neither Volkswagen nor any other person protested the method used to report or pay tonnage dues, or the fact that the item was included in the stevedore's or carrier's rate.[12]

D. Establishment of the Method of Collecting Contributions to the Mech Fund.[13]

15. The method to be adopted by PMA to collect the Mech Fund received considerable attention during the early collective bargaining between ILWU and PMA. Four or five collection methods were discussed. Mr. St. Sure testified that the ILWU's interest in the method to be adopted, ceased after it was agreed that the method of collection was to be reserved to PMA. As already stated, $1½ million had been collected on a manhour basis. In the months of June and December 1960 some members of the PMA protested the manhour basis as unfair.

16. In the meantime the Work Improvement Fund Committee appointed in November 1960 was working on its recommendations. As testified by Peter Teige, Chairman of the committee, they were hopeful of coming "up with a system that would not be excessively burdensome to anyone" but particularly one that would be "simple in administration".

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[12] In 1958, PMA advised its membership that reporting and payment of tonnage tax on automobiles (or any other cargo) on a weight basis when measurement basis should be used was an error. PMA requested corrected reports from the members.

[13] In an attempt to show clearly the agreement here involved, the following paragraphs set forth in some detail the actions and resolutions of PMA and PMA members that constitute the agreement.

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17. On January 4, 1961, the Work Improvement Fund Committee issued its recommendations in the form of a majority and minority [11] opinion.[14] The division was four to two. It is not considered essential for the purposes of this decision to state this report in detail. It shows that the Committee considered at least five methods or combination of methods of assessment. Some of these had arisen in the earlier discussions between PMA and ILWU. Reasons for and against each method were carefully set forth. The majority recommended that "the contributions to the Fund be raised on a cargo tonnage basis," which "would be the same as the present tonnage formula used for the computation of a portion of PMA dues. In this formula, bulk cargo tonnage is counted at one-fifth the value of general cargo tonnage. The tons are revenue tons—weight tons of 2,000 pounds, measurement tons of 40 cubic feet, and lumber at 1,000 board feet per ton. The cargo is that manifested for loading or discharging at Pacific Coast ports. Special rules apply to coastwise and transshipped cargo. The payments would be made by the employers of ILWU that [are] subject to the agreement."

18. On January 6, 1961 after "considerable discussion" on the subject, the Board of Directors adopted the majority report except that they provided that "all tonnage [shall be] treated equally as to rate for a period of six months, and during this interim further studies will be made on the subject".

19. On January 10, 1961, at a meeting of the PMA members, again after considerable discussion, the PMA members adopted the original majority report of the committee restoring the language, "with bulk cargoes at one-fifth the general cargo rate."[15] At the same time, they directed additional study of the method with a report due

[14] They are set forth fully in Appendix I.

[15] This resolution is fully set forth in Appendix II.

in six months. The Board of Directors was directed to examine and determine the definition of bulk cargo.

[12] 20. On January 11, 1961 a notice was sent out to the PMA membership advising them of the action taken at the respective meetings and that "The Treasurer will notify you as to the contribution rates and effective date."

21. On January 16, 1961, the Board of Directors set the rate of contribution to the Fund at 27½ cents on general cargo and 5½ cents on bulk cargo effective as of January 16, 1961. The Board also declared that "the tonnage declarations made by the companies are to be made in exactly the same manner as manifested and reported during the year 1959,[16] and any changed method of manifesting from that date will not be valid for reporting tonnages covering the fund contributions." At the January 16 meeting, the Board of Directors decided in response to a question that had been raised that scrap iron, pig iron and steel shavings should be considered as bulk cargo for assessment purposes. During the discussions it was pointed out that a change in the assessment rate of one commodity might lead to other changes; and that the subject of automobiles had already been raised.

22. By notice, dated January 17, 1961, headed "MECHANIZATION AND MODERNIZATION FUND" the Treasurer notified the PMA membership of the action of the Board of Directors. It stated in pertinent part:

> 1) Contribution rate on General Cargo will be 27½¢ per ton, as manifested with 2000 pounds weight,

[16] Volkswagen questions the appropriateness or legality of the action of the Board of Directors in inserting the year 1959, when it was not included in the resolution adopted by the membership. Volkswagen also questions the legality of other actions by PMA officials in their official capacity. This is considered without consequence or materiality to the issues in this proceeding.

40 cubic feet measurement and 1000 board feet of lumber constituting a ton. This is comparable to reporting presently being made by members for PMA tonnage dues purposes.

2) Contribution rate on Bulk Cargo will be 5½¢ per ton . . .

4) Effective date of contribution is January 16, 1961 . . .

5) Coastwise and transshipped cargoes will carry the full contribution rate for mechanization purposes.

[13] 6) Tonnage declarations by companies are to be made in exactly the same manner as manifested and reported to the Association for dues purposes during the year 1959 (excepting scrap iron and pig iron) and any changed method of manifesting from that date will not be valid for reporting tonnages covering Mechanization Fund contributions.

7) Declarations of tonnages will be made, as in the past, by member steamship companies and contracting stevedores reporting for non-member companies and government agencies, being made in exactly the same manner by such companies as PMA dues. Mechanization contributions are part of a labor contract, . . ."

The declaration form presently used for reporting tonnages to the Association for dues purposes will also be utilized for the Mechanization and Modernization program.

23. At about this time, PMA again became aware that some of the members had been reporting automobiles for tonnage dues purposes on a weight basis instead of on a

measurement basis. By letter dated February 3, 1961, PMA informed the membership that this was error.[16a] The steamship companies and contracting stevedores were told that if they had been reporting automobiles (or any other cargo) using weight when measurement should have been used, a supplementary tonnage report should be submitted together with a check to cover retroactively the additional amount of dues involved. The letter stated further that "Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis."

E. Respondents Include the Mech Fund Assessment in the Automobile Stevedoring Rate.

24. On a measurement ton basis the amount of the Mech Fund contribution on automobiles was about 10 times as great as the amount on a weight ton basis. The effect on Volkswagen may be shown by using the average figures for the VW's discharged for approximately one year during 1962. According to these figures the measurement ton (MT) of the average VW was 8.7 tons and the weight ton (WT) of the average of the VW was 0.9 tons. At 27½¢ a ton, the Mech Fund assessment on a measurement basis equals $2.35 per vehicle; and on weight equals $.25.

[14] 25. At or after the PMA membership meeting in January, 1961, Respondents and about 5 or 6 other stevedores, all of whom discharged VW's (hereafter referred to as "the group"), discussed among themselves the impact of the Mech Fund assessment on the cost of discharging automobiles. It was the consensus of the group that the company doing the discharging would be unable to absorb the contribution if it was assessed on a measurement basis

[16a] This letter mentioned the previous letter dated January 16, 1958 dealing with same reporting error on automobiles.

and it was indicated that the assessment should be passed on in the stevedoring rate to the customer.

26. The record does not clearly show how soon after the above discussions Respondents included the amount of the Mech Fund assessment on automobiles in the stevedoring rate. It is concluded that this occurred shortly after January 16, 1961.

27. Aware of Volkswagen's dissatisfaction, Respondents some time afterward offered Volkswagen a lower rate whereby Respondents would absorb an amount equal to that if the assessment had been made on a WT basis. Volkswagen rejected this offer and stated it would not pay the Mech Fund charge in the rate if it were assessed on a MT basis. Since Volkswagen was satisfied with Respondents discharging operations, Volkswagen continued to use them. For a while the charge continued at the old rate. Some time later, a lesser rate was negotiated. The rates contained the 27½¢ item. At all times Volkswagen paid the rate except for the 27½¢ item.

28. When Volkswagen ceased to pay the Mech Fund charge in the rate, Respondent ceased to pay an equal amount representing the assessment on VW's to PMA.[17]

29. There is no substantial evidence to show that the actions and discussions of the group (a) were part of the regular and official business of PMA or authorized or ratified by PMA; or (b) were part of [15] the regular and official business of the PMA membership, or (c) were thereafter ratified by PMA, or the PMA membership.

30. Evidence was introduced to show there were cargo items shipped or handled on a MT basis where the amount

[17] Similar actions occurred with and by other stevedoring contractors handling VW's.

of the Mech Fund assessment computed on that basis exceeded the amount of the assessment computed on a WT basis. In no instance, was the difference greater than on automobiles.

F. PMA Rejects Volkswagen's Protests.

31. Volkswagen became aware immediately of the MT assessment on automobiles. By letter dated January 17, 1963 addressed to PMA, it protested the assessment as a discriminatory burden on Volkswagen and requested that PMA reconsider the basis of the proposed Mech Fund assessment. Among the suggestions made was that the levy on automobiles he made on a WT basis. A similar protest was made by the Port of San Francisco.

32. In January 1961, the old Committee on the Mech Fund had been reappointed. The New Funding Committee held several meetings in February, 1961 to consider several protests that PMA had received, including that of Volkswagen. The Committee after consideration recommended to the Board of Directors that some be approved and some be disapproved.[18] With regard to automobiles, the position

[18] The committee recommended approval of requests that (1) empty Army conexes be not assessed as are empty commercial containers; (2) cargo containing Army conexes be assessed as are commercial containers moving in the trade; i.e. on manifested measurement (or weight as the case may be) basis of the cargo contained therein; and (3) coastwise cargo be assessed only once for each ton of cargo carried as has been the custom 50% at the point of loading and 50% at the point of discharge. The committee recommended disapproval of requests that (1) Army vehicles be assessed on other than a measurement basis; (2) bananas be considered bulk instead of general cargo; (3) similarly with bulk rice in containers; (4) transshipped cargo be assessed in a manner other than full rate when off-loaded and again when on-loaded because the full payment at both places was in accord with present procedure; and (5) mail should be assessed on a weight basis.

advocated by Volkswagen was rejected. The Committee recommended the continuance of [16] the assessment on an MT basis regardless of how it was manifested.[19] On March 8, 1961, the Board of Directors adopted the recommendations of the New Funding Committee.

33. The manifesting practice on the Volkswagen charter ships carrying VW's was consistent in that the VW's were manifested on a unit basis. The manifest showed no freight because it was a chartered ship. The manifest always showed the weight in kilos. Many times the manifest showed weight and measurement also. Where the VW's were transported by common carrier, the automobiles are manifested as a rule on a unit basis but the weight and measurement were both indicated thereon. The tariff on automobiles including VW's is stated on a unit basis, but the rate is dependent on the measurement of the auto. The Mech Fund assessment was included in the tariff rate.

34. On May 15, 1961, the Chairman of the New Funding Committee requested suggestions from PMA members for new or improved methods of assessing of the Mech Fund. At the request of Volkswagen, several stevedoring contractors, including Respondents, suggested that the Mech Fund assessment be established on unboxed automobiles on a "unit" basis rather than on a measurement ton basis.

35. The problem concerning payment by Volkswagen of the Mech Fund costs remained unsolved. Volkswagen continued to press for another assessment basis. At Volkswagen's request a meeting was arranged between representatives of the New Funding Committee, and Volkswagen for November 27, 1961. This meeting was also attended by other staff members of PMA and representatives of

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[19] This appears to conform to the PMA practice in the collection of its tonnage tax. See footnote 11.

stevedoring contractors handling VW's. At this meeting Volkswagen pointed out that the increase in costs due to the present Mech Fund assessment would embarrass Volkswagen in its competitive position with other compact cars. Again Volkswagen proposed a unit basis for assessment purposes.

36. Several of the stevedoring contractors including Respondents, supported Volkswagen's position. Respondents stated that as stevedoring [17] contractors and members of PMA they knew they were free to absorb the assessment if they so desired. It was their belief that they could not do so. They also stated that the action of PMA in singling out automobiles to be assessed in this manner was arbitrary.

37. The New Funding Committee met on three occasions thereafter and on December 12, 1961 decided to reject the Volkswagen proposal. The unit proposal was considered unacceptable because of the undesirable effect it would have on the overall Mech Fund program. They considered that if a unit assessment were established for automobiles, units would also have to be set up for other items of cargo from tiny boxes to locomotives, with a separate charge or assessment per unit. The recommendations of the Committee were accepted and by letter dated March 27, 1962, PMA informed Respondents there would be no change in the Mech Fund assessment on automobiles.

G. Other Changes in the Mech Fund Plan.

38. At a meeting of the PMA Board held on December 13, 1961, they adopted a recommendation of the New Funding Committee effective December 18, 1961. Some concern had been shown that some employers of clerks were

not contributing an appropriate share to the Mech Fund. To remedy this an assessment of 15¢ per man hour was set up on clerks. At the same time, the tonnage assessment was reduced to 24½¢ and the bulk cargo assessment to 5¢. In the same resolution a new assessment of 4¢ per ton on general cargo, lumber, logs and automobiles was established to be made at a Walking Bosses' and Foremen's Mechanization Fund. Volkswagen has paid the 15¢ man hour charge on clerks.

39. Subsequently, at a July 3, 1962 meeting, the Board of Directors approved a recommendation of the New Funding Committee reducing the Mech Fund rate of assessment on the coastwise movement of lumber to $.05 per ton payable 2½¢ at the port of loading and 2½¢ at the port of discharging, 1000 board feet to constitute a ton. The reasons given for the reduction were that in the past decade a penalty rate of $1.00 per hour straight [18] time and $1.50 per hour overtime had been charged for the handling of coastwise lumber. The rate was first established by collective bargaining because of improved methods of handling such cargo. No other type of cargo is subject to a similar penalty rate. For the purposes of the Mech Fund assessment, the coastwise trade was limited to such trades to which the penalty rates of $1.00 per hour straight time and $1.50 per hour overtime apply, as set forth in the basic longshore agreement.

H. Non-Members of PMA Pay the Mech Fund Charge.

40. Not all employers of longshoremen are members of PMA. The employees of these non-members belonged to the ILWU. The supplemental Agreement to the Mech Fund provided that employers who are non-members of PMA

shall contribute to the Mech Fund at comparable rates and in a like fashion as member employers. Negotiations between the ILWU and PMA resulted in a working arrangement whereby the Union would lend its assistance that nonmember companies make contributions "in exactly the same manner and in the same amounts as PMA members retroactive to January 16, 1961." Under this arrangement nonmember companies paid an assessment for automobiles on a measurement ton basis.

[19] I. Common Carriers Pay the Mech Fund Charge on Automobiles.[20]

41. Common carriers to the U. S. Pacific Coast ports carried unboxed automobiles at all times here involved. In addition to VW's there were Renaults, Mercedes and others. They were carried on berth term, that is the carrier paid for

[20] An exception is Wallenius Lines an independent carrier that had been transporting VW's to the U. S. Pacific Coast since at least 1959. The freight rate on automobiles including VW's is quoted in the tariff on a unit basis, but the rate is dependent upon the measurement of the auto. In some instances the tariff shows the actual measurement of the car and the freight rate. The automobiles are manifested as a rule on a unit basis but the weight and measurement are both indicated thereon. Commencing in early 1961, the stevedoring contractors included the amount of the Mech Fund contribution in the stevedore billings to Wallenius Lines. Wallenius at Volkswagen's request protested the item and paid the bill with the exception of the Mech amount. As a result, the Line was advised by the stevedoring contractors that its vessels would not be discharged unless the items were paid. Under these circumstances Wallenius Lines agreed with the contracting stevedores to pay the Mech Fund item with the explicit understanding that once the matter was resolved, if any monies were owing to Wallenius they would be refunded. This continued until about the end of 1962. Then, Wallenius learned that Mech Fund items contained in the stevedoring rates were not being paid by Volkswagen and they ceased to pay it also.

the loading and discharging.[21] The tariff rate for unboxed vehicles was established, if by conference, under an agreement approved by the Federal Maritime Commission and a tariff filed with the Commission, if by an independent, under a tariff filed with the Commission. No conference increased its rates because of the Mech Fund contribution. There is no evidence that any independent carrier did so. There is no evidence that any shipper of automobiles other than Volkswagen complained of the Mech Fund, its assessment or method of collection.

[20] J. Benefits under the Mech Plan to Automobile Stevedoring.

42. Commencing with about 1961, in connection with the discharge of automobiles, the stevedoring contractors were able to increase the rate of production of their gang hour. This was attributable to improvements on the VW vessels that facilitated unloading of the automobiles. Officials of stevedoring contractors testified that they could not foresee that they would be able to develop improvements in the discharging of VW's in the immediate future under the latitude allowed employers under the Mech Fund plan. This testimony did not apply to other items of cargo. Officials of the stevedoring contractors admitted they received general benefits from the Mech Fund plan, such as freedom from strikes or slow-downs. No evidence to show the amount of benefit or savings that accrued or could accrue to stevedoring contractors from the Mech plan was referred to or in-

[21] Military unboxed vehicles are an exception and are carried on an F.I.O. basis, i.e. the military is responsible for loading and discharging. The Military Department at first questioned the inclusion of the Mech Fund charge in their rate but after discussion with PMA agreed to pay the Mech Fund contribution on an MT basis. They were doing so at the time of the hearing.

troduced. All parties agreed that the Mech plan was beneficial to the trade.

K. Actions by Respondents and PMA as to their respective legal obligations in respect to Volkswagen.

43. In March 1961, after Respondents had notified PMA of Volkswagen's refusal to pay the Mech Fund charge, Respondents requested assistance from PMA as to the legal position they should take in demanding payment. Suit against Volkswagen was considered but because of a possible disturbing effect it was decided that no legal action should be taken until after the execution of the Supplemental Agreement between PMA and ILWU.

44. In the early part of December, 1961, Respondents requested authority of PMA to bring suit against Volkswagen for the payment of the 27½¢ item. On December 13, 1961, at a meeting of the Board of Directors of PMA it was decided that PMA would give legal and moral support to the Respondents if suit were started and that PMA would participate in any future legal action. The Board referred the matter to its legal counsel.

45. On July 3, 1962, the Board of the Directors met and modified the above position. PMA counsel was authorized to assist Respondents [21] (and other stevedoring companies handling Volkswagens) only if any action by or against Respondents raised issues which might jeopardize the Mechanization Plan. In that case, PMA Counsel was authorized to intervene and if necessary, assume responsibility for handling that portion of the action involving such issues. In the same resolution, the Board of Directors, reserved to PMA the right to institute action against PMA members in default in payment of their assessments.

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L. Ratification by PMA membership of acts of Board of Directors.

46. At a meeting of the PMA membership held in March 1961, 1962 and 1963 respectively, the PMA members ratified the actions of the Board of Directors for each previous calendar year.

M. The Agreement Among the PMA members to collect the Mech Fund Assessment.

Volkswagen's complaint goes to the actions of PMA, its Board of Directors and its Committees. As has already been stated there is no question that PMA is not a person subject to the Act. It follows as a matter of course that neither its Board of Directors or its Committees would be persons subject to the Act and that agreements among them in that capacity would also not be subject to the Act.

It has been found, however, that Respondents are PMA members; and that PMA members are common carriers and other persons subject to the Act.[22] It also has been found that the PMA membership, including Respondents, entered into a Mech Fund agreement among themselves through the resolution [22] of January 10, 1961. This resolution has

[22] It has already been found that Respondents, common carriers and terminal operators, all subject to the Act are PMA members. It is this factor that raises the question of Commission jurisdiction over the agreement entered into among them. A distinction must be drawn between the actions of Respondents as members of PMA and their independent actions as stevedoring contractors or terminal operators. An example of the former is the vote on January 10, 1961. An example of the latter is the discussion with the other stevedoring contractors about the inability to absorb the Mech Fund assessment. This decision is made on the basis that it is the former type of action that Volkswagen is complaining about although not specifically labeled as such. As to the latter, those actions are being referred to the Commission for appropriate action. See the last paragraph of this decision.

been implemented thereafter by further actions of the Board of Directors and the Funding Committee which subsequently were ratified by the PMA membership. Under these circumstances, there exists an agreement among common carriers and other persons subject to the Act. In order to determine whether Section 15 requires the January 10, 1961 agreement be filed, it is essential first to determine what the agreement is.

The January 10, 1961 agreement came into being as a result of the recommendations of the Work Improvement Fund Committee. This committee according to the testimony of Pres. St. Sure was created in November 1960 for the purpose of considering "the question of a method of collection" of the Mech Fund and then to make "a recommendation as to a method of payment" to the Board of Directors and the PMA membership.

The report when issued was acted upon by the PMA Board of Directors at a meeting on January 6, 1961. The Board adopted the majority report of the Committee except that it did away with the distinction for assessment purposes between general cargo and bulk cargo. The report and the action of the Board of Directors was submitted to the PMA membership for action on January 10, 1961. At that meeting, the PMA membership nullified the change made by the Board of Directors and in effect adopted the majority report of the Committee.

This simply stated is the history of the January 10, 1961 agreement. Under the circumstances, the expression of the January 10, 1961 agreement is found in two documents: The first is the report of the Work Improvement Fund Committee dated January 4, 1961 which includes the majority and minority reports. The Second is the resolution of the Membership dated January 10, 1961. Each is attached herewith marked Appendix I and II respectively.

A careful reading of these documents show that they deal solely with "the appropriate method of dividing the costs" of the Mech Fund [23] among the PMA members.[23] Nothing contained in the Committee report or the minutes of the January 10, 1961 meeting indicates that the Committee or the PMA membership in ratifying the majority report had gone or had intended to go beyond that specified area.

There is no substantial evidence to show that the actions of either the PMA membership or the Board of Directors or the Committee after January 10, 1961 was intended to do more than establish a method of assessment of the membership for contributions to the Mech Fund. As directed by the membership the Board of Directors on January 16, 1961 established a Mech Fund rate to be paid by the membership. On January 17, 1961 the membership was notified in detail about the Mech Fund plan and its assessments. Thereafter, the assessment was levied by PMA against its members.[24] There is no substantial evidence to show that the PMA members as such agreed among themselves how this assessment was to be treated after it was made, or that PMA issued any directions to any PMA member as to how it was to handle the assessment after it was made.

The evidence is clear that the tonnage dues assessed by PMA of its membership was in turn charged by the PMA membership to the shipper and the carrier in the rates; and that this had been the practice since the tonnage tax was put into effect. The evidence is also clear that the Work Im-

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[23] The minority report states the Committee was "charged with recommending methods for allocating among PMA member companies payments due under the ILWU modernization and improvement agreement."

[24] It is found that there is no substantial evidence to support Volkswagen's conclusion that PMA imposed "a non-absorbable charge on this cargo."

provement Fund Committee was aware of this fact. There is no substantial evidence to show, however, that either the Board of Directors, the Committee or the PMA membership intended that this custom or practice was to be incorporated in or apply to the Mech Fund charge. Had there been such an intention it would have been reasonable and simple to say so in either the report or the resolution.[25] The chairman of the Work [24] Improvement Committee and the Vice President of Respondents each testified that there was no understanding in the Committee or among the PMA members that the Mech Fund assessment shall be passed on to the customer by the PMA members.

That the January 10, 1961 agreement did not include agreement that the Mech Fund charge was to be passed on by the PMA members seems clear from the actions and events that occurred involving the Respondents and the VW charge. The Respondents admittedly were aware that the Mech Fund charge was their obligation as a PMA member. They also knew that they were "entirely free to absorb assessments" if they so desired. Respondents and other stevedoring contractors expressed their uniform opinion that they could not absorb the Mech Fund and the indications were that it should be passed on to the customer. Thereafter, Respondents and other stevedoring contractors included the whole Mech Fund charge in their rate to Volkswagen. Some time afterward, Respondents entered negotiations with Volkswagen for the establishment of a new rate wherein Respondents would absorb part of the Mech Fund.

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[25] There is no substantial evidence to show that there was a secret agreement among the PMA membership to that effect. Nor does Volkswagen contend that there was. In their brief, Volkswagen states, "Nor, except as to automobiles, do we see any reason to question the good faith of those who devised the tonnage assessment mechanism and its specific application."

This offer Volkswagen rejected. These discussions and actions would have been so much surplusage if the January 10, 1961 agreement had provided that the Mech Fund charge was to be passed on to the customer.

The Mech Fund assessment system has been effective since January 16, 1961. The membership has been adhering to the reporting and payment system. Since that date about $10,000,000 has been collected. There is no substantial evidence of complaint by any other person than Volkswagen. It is noted that the Board of Directors dealt with requests, in addition to Volkswagen's, as changes in the basis for the assessment on the PMA members. Also, the PMA Board varied the amounts of the assessments as well as the base upon which it was founded. There is no substantial evidence to show that the actions of PMA Board, the Committee or the PMA membership after January 10, 1961 were not consonant with the resolution then adopted.

[25] The foregoing represents a review of (1) the documents constituting the agreement of the PMA members of January 10, 1961 establishing a method of collection and payment of Mech Fund contributions; (2) the events leading to the passage of these resolutions; and (3) the actions of the parties thereafter in carrying out the resolution.[26] Preponderantly, and on the record as a whole, it is found that these actions constituted an agreement among the PMA members establishing a cooperative working arrangement among common carriers and other persons subject to the Act, whereby for Mech Fund purposes, PMA was to assess a contribution on the PMA members according to a tonnage

[26] Considerable weight is given to the actions of the parties in carrying out an agreement to determine what was intended. Cf. *Contract Rates—Port of Redwood City*, 2 U.S.M.C. 727, 739 (1945).

formula and that the contribution was to be reported and paid to PMA by the membership accordingly.[27]

THE ISSUES

1. Are Respondents considered other persons subject to the Act?

2. Does the cooperative working arrangement of January 10, 1961 entered into by Respondents and other persons subject to the Act as PMA [26] members and their actions taken thereafter pursuant to this arrangement constitute an agreement that must be filed under Section 15 of the Act?

3. Does the action of Respondents in incorporating into their stevedoring rate for Volkswagen the entire amount of

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[27] Volkswagen does not conclude differently. See Volkswagen opening brief, page 7 where they state that they are not referring to the independent acts of Respondents because "of necessity [they] are the direct results of action taken by PMA." Also page 37, ". . . respondents by necessity had to increase [their stevedoring] charges pro tanto. Respondents' net profit and that of all stevedores' is less than one dollar per car. Certainly, therefor, respondents could not absorb a $2.75 or $2.85 by car measurement ton assessment although they would have been able to assume a weight ton assessment about ten times less than such amount. As respondents' and VW's other terminal contractors had no reason to service this customer at a loss, it was obvious that—with the possible exception of a few cents—the measurement ton assessment had to become part of their rate structure.

Without placing an unduly sinister implication on this, we mention the admission of respondents Vice President that 'all stevedores involved in this case,' i.e., all the stevedore and terminal contractors working for VW, got together and, at least, expressed their "uniform opinion", that they could not absorb and therefore would have to pass on the Fund assessment on Volkswagen automobiles if levied on a measurement ton basis." (Page reference to transcript eliminated).

the Mech Fund charge constitute a violation of Sections 16 and 17 of the Act?

Discussion

I. Respondents are other persons subject to the Act.

Respondents contend that they are not "other person(s) subject" to the Act because they do not carry on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" within the definition laid down in Section 1 of the Act. This contention is based on two legs: (a) the only movement of VW's in controversy in this proceeding is that on the chartered vessels of Volkswagen, and as to the that movement, Respondents are not supplying facilities "in connection with a common carrier by water"; (b) Volkswagen objects to and complains only about the stevedoring aspect of the services performed by Respondents, and the Commission has never exercised jurisdiction over stevedoring activities.[28]

There is no doubt that Respondents are other persons subject to the Act. Respondents as members of PMA voted with the other members of PMA to approve the January 10, 1961 resolution. At that time they were admittedly furnishing terminal facilities to common carriers by water. At all times herein involved while supplying stevedoring services to the chartered ships of Volkswagen the record shows and Respondents admit they were supplying terminal facilities, not only to Volkswagen, but also to other common carriers.

[27] The Commission and its predecessors have consistently taken jurisdiction over terminal operators under

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[28] Citing *California Stevedore & Ballast Co., et al. v. Stockton Port District, et al.*, 7 F.M.C. 75 decided January 26, 1962.

similar circumstances.[29] As terminal operators they are members of conferences whose agreements have been filed with and approved by the Commission. Under all the circumstances herein, it is found that Respondents at all times herein involved are other persons subject to the Act and to the Commission's jurisdiction. Nor would it be considered a bar to the Commission's jurisdiction over Respondents should it prove that a portion of the present proceeding deals with an operation over which the Commission does not or may not have taken jurisdiction.[30]

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[29] See *Agreements Nos. 8225 and 8225-1, etc.* 5 FMB 648 decided August 6, 1959, affirmed *Greater Baton Rouge Port Commission, et al.* v. *F.M.B.* 287 F 2d 86 (CA 5) 1961, c.d. 368 U. S. 985 (1962). *International Trading Corporation of Virginia, Inc.* v. *Fall River Line Pier Inc.* 7 FMC 219, 224-225, decided April 16, 1962. Note also the Commission's full discussion on this subject in *Status of Carloaders and Unloaders* 2 U.S.M.C. 761, 767-770. The principles stated therein are equally applicable here.

[30] See *California Stevedore & Ballast Co. et al. supra* at page 81. Compare the Commission's language in a mimeographed Denial of Motions to Dismiss in Docket No. 1158, *In the Matter of Agreements No. 134-21, etc.* issued April 28, 1964:

> While it may in the final analysis prove true that a carrier may operate as both a common carrier and a contract carrier and that we have no jurisdiction over contract carriage this is one of the questions the proceeding was instituted to resolve. Our predecessor, *In the Matter of Agreements 6210, et al.*, 2 USMC 166, 170 (1939) held that section 15 of the Shipping Act, 1916 (46 U.S.C. 814) required the disapproval of agreements which result in unreasonable and unjust discrimination or prejudice to a carrier's common carrier service, even though the discriminatory practices result from or are part of the contract phase of the carrier's activities.

II. THE COOPERATIVE WORKING ARRANGEMENT AMONG PMA MEMBERS REGARDING THE MECH FUND DOES NOT CONSTITUTE A SECTION 15 AGREEMENT.

We have found that the cooperative working arrangement among the PMA and the PMA members is an agreement for the purposes of collecting the sum of $29,000,000. to pay off the obligation of the PMA members assumed under its agreement with ILWU. We have also found that common [28] carriers by water and other persons subject to the Act including Respondents have entered into a "cooperative working arrangement". Another factor is necessary to permit the conclusion that the agreement in this proceeding is within the purview of Section 15 and as such is required to be filed. That factor is not present here.

The Commission categorically has listed in the following fashion agreements that must be filed under Section 15.[31]

(1) fixing or regulating transportation rates or fares, or

(2) giving or receiving special rates, accommodations, or other special privileges or advantages, or

(3) controlling, regulating, preventing, or destroying competition, or

(4) pooling or apportioning earnings, losses, or traffic, or

(5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports, or

(6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried, or

[31] See *Pacific Coast European Conf.–etc.* 5 FMB 247, 259 (1957).

(7) in any manner providing for an exclusive, preferential, or cooperative working arrangement.

There is no question that the agreement herein does not fit any of the first six categories above listed. Taking the seventh category literally, it fits therein.

In light of the fact that Section 15 provides that a common carrier or other person subject to the Act shall file *every agreement* and Volkswagen contends:

> . . . "the collective bargaining, the labor cost, labor charges" are not at all involved in this case. VW has never objected to the agreements reached between PMA and ILWU. On the contrary, it has expressed the opinion that these agreements represent a most impressive and salutary achievement in labor relations.
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> [29] The Fund assessment is another matter, wholly divorced from labor-management problems. This case would be exactly in the same posture if PMA had made the assessment to raise funds for an office building, for hiring halls or for other facilities for use by its members. Obviously, the distribution of such costs, whether arising out of a labor agreement or out of any other project, is not protected from Commission scrutiny by an exemption, statutory or other.

the question must be resolved whether the particular cooperative working arrangement between PMA members who are common carriers or other persons subject to the Act must be filed under Section 15. The answer must be in the negative.

Examination of previous cases shows none nor has any been cited that bears precisely on this point. It would be idle conjecture to imagine what might be filed with the Commission, if the requirement in Section 15 that every

agreement between common carriers and other person subject to the act providing for a cooperative working arrangement were taken literally. Some limitation must be applied.

The Supreme Court has stated that it is the Commission's function "to determine whether any agreement such as is described in the [Act] has actually been made."[32] The Commission early in its history recognized that the words "every agreement" in Section 15 must be circumscribed.[33] The language of the Circuit Court with regard to the Board's approval of Section 15 agreements may if paraphrased be applied with equal weight to filing requirements, i.e., the language of the Act does not look inanely to the Board requirement that a business agreement be filed, but to an agreement the aims and purposes of which will bring it within the reach [30] of the section . . .[34] To require the filing of any agreement between carriers and other person subject to the act providing for a "cooperative working arrangement" would be dealing with the language of the Act in an inane fashion. Logically, this would require the filing of the agreement among the PMA members to organize PMA even though the latter corporation was

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[32] *U. S. Navigation Co.* v. *Cunard S.S. Co.* 284 U. S. 474; 50 F 2d 83, 90 (CA 2 1931).

[33] See *Section 15 Inquiry,* 1 U.S.S.B. 121 (1927) the Commission determined that "agreements are to be distinguished from the routine of conference activities."; that "a literal interpretation of the word 'every' to include routine operations . . . would result in delays and inconvenience to both carriers and shippers"; that "sending the board . . . circulars and tariffs . . . which contain references only to routine arrangements . . . is not regarded as a filing under section 15 . . ."

[34] *Associated Banning* v. *F.M.B.* 247 F 2d 557, 560 (CAD.C.) 1957.

organized for collective bargaining purposes.[35] Volkswagen, however, does not extend its position that far.

It is not possible to lay down any hard and fast rule concerning the filing of agreements within category 7. Whether this agreement must be filed, or that agreement need not be filed would depend upon the facts and circumstances under which the agreement came into being and the aims and purposes expressed therein. It is possible to lay down some guide lines [36] to indicate which cooperative working arrangements must be filed. Either of two sets of guide lines may serve this purpose.

The Act was formulated for the purpose, among others, of regulating carriers by water engaged in the foreign and interstate commerce of the United States.[37] In other words, the regulation of ocean transportation. Thus, it follows that any cooperative working arangement dealing with or pertaining to ocean transportation is an agreement that is subject to the Act.[38] By the same token, Section 15 would

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[35] Cf. *Associated-Banning Co. et al.* v. *Matson Nav. Co. et al.*, 5 F. M. B. 336, 341 (1957) where the Commission approved an agreement for the formation of Matcinal, "which agreement is little more than evidence of a general intention of the parties to enter the stevedoring, terminal and carloading and unloading business as partners acting through the new corporate entity."

[36] These guide lines of necessity are very flexible. Axiomatically, each case must stand on its own feet.

[37] Preamble to the Shipping Act of 1916.

[38] Undoubtedly it is ocean transportation that former Chairman Morse meant when he testified before the Celler Committee "Any cooperative working arrangement which in my opinion deals with transportation. A cooperative working arrangement which did not deal with transportation in my opinion would not be covered by section 15." See House Report No. 1419, 87th Congress, 2d Session, Report of the Antitrust Subcommittee page 333.

not require the filing of [31] cooperative working arrangements that did not pertain to ocean transportation.[39]

Another method would be to apply the rule of ejusdem generis to Section 15. Under this rule the Commission would be required to construe the language: "in any manner providing for an exclusive, preferential, or cooperative working arrangement" coming as it does at the end of a list of practices and arrangements as limited to the practices and arrangements of the same general class as those specifically mentioned in the previous six categories.[40]

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[39] The Legislative history of the Act supports this statement. Note The Alexander Report filed pursuant to H. Res. 587, 63rd Congress Chapter X pages 281-314; particularly the opening paragraph of Recommendations Relating to Water Carriers Engaged in Foreign Trade at page 415, reading as follows:

> The facts contained in the foregoing report show that it is the almost universal practice for steamship lines engaging in the American foreign trade to operate, both on the in-bound and out-bound voyages, under the terms of written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines.

The language of Section 15 in the 1961 amendment to the Act is the same as that contained in the 1916 Act. The latter was based on the recommendations contained in the Alexander Report. See H.R. #659 dated May 19, 1916, 64th Cong., 1st Session and Senate Report #689 dated July 19, 1916, 64th Cong., 1st Session. See also the language of the Commission: *In re: Pacific Coast Conference* 7 FMC 27 at page 34 (1961).

[40] This concept is not novel. The Commission has already applied the rule of ejusdem generis to Section 16 Second. See *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 FMB 556, 563 (1951).

ing the Mech Fund assessment, it is clear that the arrange-

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Applying either guide line to the cooperative working arrangement between and among the PMA members creatment is one that pertains neither to ocean transportation nor to the first six categories listed above. Under these circumstances it is found that the agreement is a cooperative working arrangement without the purview of Section 15 and need not be filed with the [32] Commission even though the parties thereto are common carriers and other persons subject to the Act.[41]

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[41] Volkswagen concedes that Commission jurisdiction does not extend "to activities of regulated persons unrelated to maritime transportation." See *In the Matter of Wharfage Charges and Practices at Boston,* 2 U.S.M.C. 245 (1940) where it was held that though a railroad company is also a regulated marine terminal operator, it is clear that in handling of cargo on the rails it is not within the scope of the Act. On the other hand, the Commission will take jurisdiction over agreements between persons covered by the Act which deal with matters not covered by the Act, such as brokers, stevedores, and passenger agents when those matters pertain to or deal with marine transportation. See *In re Gulf Brokerage and Forwarding Agreements,* 1 U.S.S.B.B. 533, 534 (brokerage was then not covered by the Act); *California Stevedore & Ballast Co. et al.* v. *Stockton, etc.* supra (the Commission has not yet declared its jurisdiction over stevedoring); *Investigation of Passenger Steamship Conferences, etc.* Docket #873 decided February 19, 1964, page 23 of mimeographed decision (passenger agents).

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III. Other Contentions of the Parties concerning Section 15.[42]

PMA has raised a contention concerning the relationship between labor agreements and the Shipping Act. Volkswagen raises a contention concerning the relationship of Sherman Act case principles to the Shipping Act. Each of these is discussed briefly in this section.

A. *It is unnecessary to determine that the agreement establishing the method of collecting the Mech Fund is part of a labor agreement.*

A major contention by PMA is that the Commission does not have jurisdiction of the agreement establishing the method of collecting the Mech Fund because it is a part of a collective bargaining agreement; that there is a fundamental national policy that the Commission may not [33] butt in to the process of collective bargaining. It is unnecessary that the Commission determine whether the subject agreement is or is not part of a labor agreement. Under the Act the Commission is empowered and directed by Congress to deal with those agreements that come within

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[42] Volkswagen in its briefs has advanced a contention not previously made either in the courts or during the hearing herein to the effect that the "liner" or "common carrier" interests dominate PMA, particularly in its actions with regard to the Mech Fund assessment; that by reason of the liner dominated interests, PMA "whether acting through its Board of Directors or through its membership meeting, would have at heart primarily the interests of the liners" to the particular detriment of Volkswagen a user of chartered vessels. Without commenting on the significance of this contention, it is found that there is no substantial evidence in the record to support Volkswagen's contention.

the purview of the Act.[43] To make a determination that the Agreement is either within or without section 15, the Commission looks to the standards set forth in Section 15.[44] The fact that the agreement (or the parties) may also come within the scope of another statute does not deprive this Commission of jurisdiction.[45] It is in accordance with these precepts which have been announced by the Commission in no uncertain terms[46] that this proceeding has been decided.

B. *Sherman Act prohibitions and their effect on the instant proceeding.*

Volkswagen contends that the agreement here involved is within the purview of Section 15 because it is one "fixing or regulating rates", or "controlling, regulating, preventing or destroying competition." Volkswagen arrives at this conclusion by stating among other things that under the antitrust laws "it is well established that any collective action among competitors having a direct impact on prices

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[43] See *Far East Conference* v. *U. S.* 342 U. S. 570 (1952), *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U. S. 474. Note: Sec. 22 of the Act provides that any person may file with the Commission a complaint setting forth a "violation of *this Act* . . . (emphasis supplied). Further in the same section the Commission on its own motion is given authority to "investigate any violation of this Act."

[44] See footnote 46.

[45] Cf. *D. J. Roach Inc.* v. *Albany Port District, et al.*, 5 F.M.B. 333, 334 (1957).

[46] Cf. *Alcoa Steamship Co.* v. *Cia Anonima Venezolana de Navegacion, et al.* 7 FMC 345, 364 where the Commission stated,

> This proceeding lies under Section 15 of the Shipping Act of 1916. This section sets out the standards for approval or disapproval of agreements filed according to its terms. We here apply those standards and no others. We are not concerned here with any promotional provision of the laws, . .

is prohibited."[47] [34] There appears to be no doubt that the Mech Fund created for each participant a new business expense. How each participant intended to, or did handle that expense is not shown. There is no substantial evidence of any agreement or collective action among the PMA members in that regard.[48] It may be as Volkswagen states that each participant was required "by necessity" to pass the charge on to the customer. If so, then the charge could have been passed on in full, or in a greater or lesser amount. The participant was free to absorb any of the assessment or not, or add a percentage thereon for profit and overhead. This, however, constitutes a matter of business judgment that each participant individually would be required to make. No case has been referred to that declares this type of business action is violative of the anti-trust laws. In any event, in light of the fact that it has been found that the Mech Fund agreement is not required by Section 15 to be filed, and that as found hereafter Respondents have not been shown to have violated Sections 16 and 17 of the Act, it is considered unnecessary in this proceeding to determine whether the actions of Respondents and other PMA members are prohibited under the anti-trust laws.

IV. THE MEASUREMENT TONNAGE ASSESSMENT INCLUDED BY RESPONDENTS IN ITS STEVEDORING RATE DOES NOT DISCRIMINATE AGAINST AUTOMOBILES IN VIOLATION OF SECTION 16 OF THE ACT.

In its opening brief Volkswagen makes the following statement:

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[47] The cases cited by Volkswagen stand for the proposition that an agreement or concerted action "designed to affect prices" constitutes a violation. See *U. S.* v. *Gasoline Retailers Ass'n, Inc.*, 285 F 2d 688, 691 (7 CA 1961).

[48] Except possibly as to the group that held the conversation about the inability to absorb the automobile assessment.

We do not claim that the measurement formula "regardless of how manifested" subjects Volkswagen automobiles to "prejudice or disadvantage" as compared to other automobiles, and we admit that there is no other cargo classification in competition with automobiles.

Under decisions of predecessor agencies of the Federal Maritime Commission in such cases, section 16 of the Shipping Act, 1916 (46 U. S. C., section 815), has been held inapplicable. *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij "Nederland,"* 4 F. M. B. 343 (1953); *Paraffine Companies, Inc.* v. *American-Hawaiian S.S. Co.*, 1 U.S.M.C. 628 (1936); *Johnson Pickett Rope Co.* v. *Dollar S.S. Lines, Inc., Ltd.*, 1 U.S.S.B. 585 (1936). The Hearing Examiner may consider himself bound by these precedents.

[35] Our only reason for invoking section 16 at this time, accordingly, is to preserve the issue so as to be able to, ask for a reconsideration of the above rulings if this case should reach the Commission itself and also to have it available for possible judicial review.

The facts and circumstances herein substantially support Volkswagen's admission that there is no other cargo classification in competition with automobiles. On the record as a whole it is found that the action of Respondents in including the Mech Fund charge in their stevedoring rate does not constitute undue or unreasonable preference or advantage within the meaning of Section 16 of the Act.

V. THE MEASUREMENT TONNAGE ASSESSMENT INCLUDED BY RESPONDENTS IN ITS STEVEDORING RATE FOR AUTOMOBILES IS NOT AN UNJUST AND UNREASONABLE PRACTICE WITHIN THE MEANING OF SECTION 17 OF THE ACT.

Section 17 of the Act requires that a person subject to the Act "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.'"

As stated above, neither PMA nor the agreement between and among PMA members has been found subject to the Act. For that reason we do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement. Volkswagen is complaining about Respondents practice of including the Mech Fund assessment in its stevedoring rate. This discussion concerning Section 17, therefore, deals with the relationship between Respondents and Volkswagen.

Prior to the establishment of the Mech Fund Volkswagen negotiated its rate for discharging VW's with Respondents on what amounts to a cost plus basis. Volkswagen admittedly was aware of each item that went to make up the rate. Volkswagen does not contend that any item included in that rate or the rate charged by Respondents without the Mech Fund Charge was either unjust or unreasonable. Thereafter, Respondents faced with the obligation to pay the Mech Fund assessment decided, at least as [36] to automobiles, to include an equal amount in the rate for handling automobiles. Does this action by Respondents constitute an unjust and unreasonable practice?

There is no contention by Volkswagen or any evidence to show that the inclusion of the Mech Fund charge in Respondent's rate would increase Respondent's profits. As stated above, Volkswagen does not contend that Respondents profits are unjust or unreasonable. There is no doubt

that under the circumstances here stated the Mech Fund assessment as included in Respondents' rate constitutes an operating expense applicable to the discharge of automobiles. Volkswagen does not content that the inclusion of an operating expense as such is either improper or unreasonable.

Volkswagen's complaint is addressed in effect solely to the amount of the assessment.[49] Respondents took such action as was available to them to assist Volkswagen. At the latter's request Respondents solicited PMA in an effort to have the basis for the assessment on automobiles changed from measurement to weight or reduced in some other manner. Also Respondents assisted Volkswagen when the latter presented their application for a change to PMA. PMA did not act favorably on this request. Respondents offered to compromise the matter by absorbing a part of the assessment. Volkswagen refused that offer. No case or law has been cited that compels Respondents under these circumstances to absorb the assessment or to refrain from attempting to collect the entire amount from its customer. Precedent for the latter action was well established with regard to the tonnage tax to which Volkswagen never objected even though it was set on a measurement basis.

The evidence shows that the Mech Fund charge was included in the rate charged for all other foreign cars. Volkswagen was not the only [37] shipper to whom the rate applied but Volkswagen is the only shipper that has refused to pay the charge. There is no evidence to show that the other shippers considered unjust or unreasonable the Mech Fund charge inclusion in the rate. Also where VW's were shipped by conference carrier and discharged by Respondents the conference rate was paid. That included the Mech Fund charge.

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[49] Volkswagen's contention that the Mech Fund charge puts the VW at a competitive disadvantage in relation to other compact cars is given little weight considering the relationship between the Mech Fund charge of about $2.35 to the selling price of VW's.

Volkswagen claims that PMA compels the Respondents to impose this excessive charge for the handling of automobiles in order that PMA may make up for deficiencies in revenue resulting from subsidies for coastwise lumber shipments, as well as, in some degree, from undue benefits bestowed on other cargo generally. Without commenting on the validity of this contention, it is significant that no charge of this nature is levelled against Respondents, nor is there any evidence to show that charges attributable to the handling of other cargo are attempted to be collected by Respondents from Volkswagen.

Under the circumstances in this case it is evident that Respondents as a matter of business expediency included the Mech Fund contribution for automobiles in their stevedoring rate. The result may be a higher rate than Volkswagen may desire to pay. There is insufficient evidence, however, to establish that this practice was either unjust or unreasonable.[50]

ULTIMATE CONCLUSIONS:[51]

On the record as a whole it is found:

(1) The agreement entered into on January 10, 1961 by PMA members who are common carriers and other persons subject to the Act including [38] Respondents constitutes a cooperative working arrangement. It has not been shown that this is an agreement fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competi-

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[50] Cf. *Evans Cooperage Co. Inc.* v. *Board of Commissioners of the Port of New Orleans* 6 FMB 415. Note conditions laid down by the Commission in *Nickey Bros., Inc.* v. *Manila Conference* 5 FMB 467, 476.

[51] Requested findings, conclusions and contentions not discussed in this decision or embraced herein have been considered and are not justified by the record or are unnecessary for the determination of the issues herein.

tion; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or dealing with ocean transportation. Accordingly the PMA members subject to the Act were not required to file a copy as provided in Section 15. The non-filing of a copy of said agreement did not and does not constitute a violation of the Act.

(2) Respondents have not been shown to have made or given any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, or subjected any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever in violation of Section 16 of the Act.

(3) Respondents have not been shown to have established or enforced an unjust or unreasonable practice in violation of Section 17 of the Act.

For the foregoing reasons the complaint should be dismissed.

Evidence in the record indicates that Respondents and other stevedoring contractors may have entered into an agreement some time after January 10, 1961 to the effect that the automobile Mech Fund assessment could not be absorbed and that it should be passed on to the customer in the shipping rate. Such an agreement may well be within the purview of Section 15. The Examiner raised some questions with regard to this matter but was limited by the scope of the complaint hearing. Volkswagen placed no "undue sinister implications" on this agreement and did not attempt to examine into the matter fully. Accordingly, the matter is referred to the Commission for appropriate action.

/s/ Benjamin A. Theeman

Washington, D. C.
June 4, 1964.

BENJAMIN A. THEEMAN,
Presiding Examiner.

Appendix I, Annexed to Foregoing Initial Decision

(Same as Exhibits 5-A and 5-B printed herein at pages 466a to 479a.)

Appendix II, Annexed to Foregoing Initial Decision

[3] DETERMINATION AS TO METHOD OF CONTRIBUTION TO ILWU-PMA MODERNIZATION AND IMPROVEMENT FUND: The Chairman reported that the Board of Directors had previously approved the Agreement between the PMA and ILWU of October 18, 1960, but had left the question of the method of contributions to the Fund for membership action.

A Sub-Committee to recommend the method of funding has been working for approximately two months and reported to the Board of Directors at its meeting on January 6, 1961. The Board of Directors after considering the Majority and Minority Report of the Sub-Committee voted: "That the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months, and during this interim further studies will be made on this subject."

Considerable discussion then developed concerning the Majority and Minority recommendations of the Committee and the position of the bulk carriers.

It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued [4] study and be presented to the Membership again in six months.

The Chairman explained the three recommendations which had been made:

Appendix II

1. *Majority Report* (on which the motion is based)

   26¾¢ on general cargo
   5½¢ on bulk

2. *Minority Report*

   10¢ a ton

   12¢ per manhour

3. *Board of Directors*

   20¢ a ton

It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

At this time a secret ballot was taken and the vote was polled as follows:

246	yes
74	no
21	withheld
67	absent

Motion carried by a majority of the total voting strength of the Association Membership.

The Chairman announced that the motion would be construed to mean that if a different method of contribution should be adopted 6 months hence, it would not have retroactive application.

RATIFICATION OF ILWU-PMA AGREEMENT:

It was moved, seconded and unanimously carried by voice vote that the Agreement of October 18, 1960, between the PMA and ILWU be ratified.

Complainant's Memorandum of Exceptions to Conclusions, Findings and Statements in Initial Decision

(Filed July 31, 1964)

[1a] Volkswagenwerk Aktiengesellschaft ("VW"), complainant, hereby excepts to the following conclusions, findings and statements in the Initial Decision of Examiner Benjamin A. Theeman, dated June 4, 1964:

1. VW excepts to the Examiner's failure to find that automobiles are burdened more heavily than any other cargo by the assessments on the handling of cargo at Pacific coast ports for the Mechanization and Modernization Fund (the "Fund") of intervener, Pacific Maritime Association ("PMA"), which assessments respondents, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (hereinafter referred to collectively as "MTC"), seek to collect from VW.VW, in particular:

(a) Excepts to the Examiner's failure to find that PMA's Fund assessment, compared with either the total cost of discharge or the total direct labor cost involved in discharge, has an impact on automobiles about ten times as great as upon average general cargo;

(b) Excepts to the Examiner's failure to find that reductions in the Fund assessment with respect to lumber and coastwise trade—bringing the assessment on lumber in this trade to one tenth that on general cargo and one hundredth that on automobiles—were made in order to strengthen the position of PMA member carriers in their competition with outsiders;

(c) Excepts to the Examiner's failure to find that through an assessment on a measurement ton basis the total cost of discharge of VW's automobiles at

United States Pacific coast ports is increased by about 26 percent, while the average increase of the [2a] cost of discharge of all general cargo through PMA's Fund assessment amounts to only a little more than 2 percent; and

(d) Excepts to the Examiner's failure to find that an assessment on a measurement ton basis on automobiles amounts to about 56 percent of the total direct labor cost involved in the discharge of this cargo while the total Fund assessments levied by PMA against its members represent only about 5 percent of their total shoreside direct labor cost.

2. VW excepts to the Examiner's failure to find that the disproportionate assessment of automobiles by PMA for Fund purposes is without any justification. VW, in particular:

(a) Excepts to the Examiner's failure to find that PMA levies the Fund assessment for all types of cargo other than automobiles according to the manner in which such cargo happened to be manifested in 1959, and that as to automobiles PMA introduced an assessment practice different from that used for all other cargo, inasmuch as it provided that assessments on automobiles should be made in all cases on a measurement ton basis;

(b) Excepts to the Examiner's failure to find that there was not in 1959 and there is not at this time any uniform practice with respect to the manfesting of automobiles, except that automobiles were and are manifested and freighted in the intercoastal and coastwise trade consistently on a weight basis and except that shipments of VW's vehicles and

other automobiles in the foreign trade were and are manifested and freighted most frequently on the basis of the number of units, with an additional indication of weight and, in some instances, of measurement;

[3a] (c) Excepts to the Examiner's failure to find that a measurement assessment on automobiles is particularly inappropriate with respect to the Fund, which involves stevedoring and terminal operations, since measurement has no significant relation to the amount of labor required in the handling of automobiles;

(d) Excepts to the Examiner's failure to find that the discharge at United States Pacific coast ports of automobiles in general and of VW's automobiles in particular was not benefited more, and was probably benefited less, than the discharge of general cargo on the average by the concessions which the International Longshoreman's and Warehousemen's Union made in return for the creation of the Fund;

(e) Excepts to the Examiner's failure to find that the economic effect of PMA's attempted measurement ton assessment on automobiles is to burden the stevedoring and terminal handling of automobiles with substantial expenses which actually relate to the stevedoring and terminal handling of other types of cargo; and

(f) Excepts to the Examiner's statements that (i) the charges for stevedoring of automobiles were on a measurement ton basis, (ii) tonnage membership dues to PMA were reported and paid on that basis and (iii) precedent for collecting the Fund assess-

ment from VW on a measurement basis was well established by the tonnage membership dues.

3. VW (a) excepts to the Examiner's failure to find that through the Fund assessment on automobiles, PMA imposed on automobiles in general and on VW's automobiles in particular a charge which could not be absorbed by MTC and (b) excepts to the Examiner's statement that there is no substantial evidence to support VW's conten- [4a] tion that PMA imposed a non-absorbable charge on VW's cargo.

4. VW excepts to the Examiner's failure to find that liner interests dominate over stevedoring and terminal operator interests both in the Board of Directors and in membership meetings of PMA, and that PMA acted in the interest of the liners with respect to the Fund assessment. VW, in particular:

(a) Excepts to the Examiner's failure to find that the by-laws of PMA provide for the election of twenty-one directors comprising at least thirteen representatives of shipping lines;

(b) Excepts to the Examiner's failure to find that of the remaining eight members of PMA's Board of Directors, four are elected through area membership meetings and four are representatives of stevedoring firms and terminal operators, the latter being elected with the votes also of those members who are both steamship operators and stevedoring contractors;

(c) Excepts to the Examiner's failure to find that PMA's by-laws further contain provisions for voting at membership meetings which result in a large

majority of the votes being held by liner interests and a small minority of the votes being held by stevedoring and terminal operator interests;

(d) Excepts to the Examiner's statement that there is no substantial evidence in the record to support VW's contention to the effect that the liner or common carrier interests dominate PMA, particularly in its actions with regard to the Fund assessment and that by reason of such domination PMA, whether acting through its Board of Directors or through membership meetings, would have at heart [5a] primarily the interests of the liners to the particular detriment of VW, a user of chartered vessels:

(e) Excepts to the Examiner's failure to find that in imposing and maintaining the Fund assessment the liner interests dominating PMA deliberately shifted a burden from their own operations to VW's automobiles, a cargo which predominantly uses a method of transportation in competition with liners, *i.e.*, chartered vessels; and

(f) Excepts to the Examiner's statement that the reason why the proposal for assessment of automobiles on a unit basis was considered unacceptable by PMA's second Funding Committee was because of the undesirable effect it would have on the overall Fund program rather than because it would adversely affect liner interests.

5. VW excepts to the Examiner's statements that agreements effected through corporate action of PMA are not subject to the Shipping Act, 1916 (the "Act").

Complainant's Memorandum of Exceptions to Conclusions, Findings and Statements in Initial Decision

6. VW excepts to the Examiner's conclusion, and to all statements of the Examiner in support of this conclusion, that the cooperative working arrangement found to have been made among members of PMA, including MTC, is not subject to section 15 of the Act.

7. VW excepts to the Examiner's conclusion, and to all statements of the Examiner in support of this conclusion, that MTC and the other members of PMA have not been shown to have made or given any undue or unreasonable preference or advantage to any particular person, locality or description of traffic, or subjected any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in violation of section 16 of the Act.

[6a] 8. VW excepts to the Examiner's conclusion and to all statements of the Examiner in support of this conclusion, that MTC and the other members of PMA have not been shown to have established, observed or enforced an unjust or unreasonable practice in violation of section 17 of the Act.

9. VW excepts to the Examiner's statement that VW's proposed Findings of Fact submitted to the Examiner numbered 21 (second sentence), 23, 24 (second sentence), 26, 27, 29, 35, 37, 38, 39 and 40 and VW's proposed Conclusions of Law submitted to the Examiner numbered 3 through 7, inclusive, are not justified by the record or are unnecessary for the determination of the issues herein.

Exceptions and Brief in Support of Exceptions of Respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles)

(Filed August 3, 1964)

[1] BEFORE THE

FEDERAL MARITIME COMMISSION

[SAME TITLE]

Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), respondents in Docket No. 1089, except to the initial decision of the Examiner, dated June 4, 1964, in the following respects:

Exception No. 1: To the statement:

> "As more fully discussed hereafter, Respondents operate terminal facilities in the respective ports and are clearly 'other persons' subject to the Act" (Initial Decision "I.D.", 4-5)

Exception No. 2: To the statement:

> [2] "There is no doubt that Respondents are other persons subject to the Act. Respondents as members of PMA voted with the other members of PMA to approve the January 10, 1961 resolution. At that time they were admittedly furnishing terminal facilities to common carriers by water. At all times herein involved while supplying stevedoring services to the chartered ships of Volkswagen the record shows and Respondents admit they were supplying terminal facilities, not only to Volkswagen, but also to other common carriers." (I.D., 26)

Report of the Commission

Exception No. 3: To the statement:

"Evidence in the record indicates that Respondents and other stevedoring contractors may have entered into an agreement some time after January 10, 1961 to the effect that the automobile Mech Fund assessment could not be absorbed and that it should be passed on to the customer in the shipping rate. Such an agreement may well be within the purview of Section 15." (I.D., 38)

* * *

Report of the Commission

(Filed October 13, 1965)

[1] FEDERAL MARITIME COMMISSION

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, ET AL.

Agreement between members of Pacific Marine Association, including respondents, establishing the method of assessing and collecting contributions to pay their obligation under an agreement with the International Longshoremen's and Warehousemen's Union found not subject to section 15 of the Shipping Act, 1916.

Report of the Commission

Respondents' having included the assessment in its entirety in their rate to Volkswagen for discharging automobiles found not to have violated sections 16 and 17 of the Act.

Stanley S. Madden and *Walter Herzfeld,* attorneys for Volkswagenwerk Aktiengesellschaft, complainant.

Bryant K. Zimmerman, attorney for Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), respondents.

Edward D. Ransom and *Gary J. Torre,* attorneys for Pacific Marine Association, intervener.

By the Commission: (John Harllee, Chairman; Ashton C. Barrett and James V. Day, Commissioners.)

This proceeding arises out of a complaint filed by Volkswagenwerk Aktiengesellschaft (Volkswagen or VW) involving the payment of certain charges imposed by respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), for services rendered in discharging complainant's automobiles at respondents' terminals in San Francisco and Los Angeles.

Pacific Marine Association (PMA), a corporation composed of carriers, marine terminal operators and stevedore contractors on the Pacific Coast, which acted as collective bargaining unit for these groups in their negotiations with the International Longshoremen's and Warehousemen's Union (ILWU), intervened. Respondents are members of PMA.

An Initial Decision was issued by Examiner Benjamin A. Theeman, exceptions and replies thereto were filed, and oral argument was heard.

Report of the Commission

[2] FACTS

Beginning in 1957 ILWU and PMA entered into a series of negotiations in an attempt to correct some of the inefficient practices that were prevalent in stevedoring on the Pacific Coast and to allow for the introduction by employers of labor saving devices in connection with the work of cargo handling. In return for this concession to management, the workers were to share in the savings made possible by the reduction in wage costs.

On August 10, 1959, PMA entered into an agreement with ILWU to raise a $1½ million dollar fund for the benefit of the work force. The agreement did not state how the sum was to be raised, but it was accumulated by PMA's assessing its members on a man-hour basis. The fund, called "Mechanization and Modernization" fund (hereinafter "Mech" fund) was subsequently expanded to $29,000,000 to be accumulated over a 5½ year period by an agreement entered into between ILWU and PMA, subject to ratification by their respective memberships, on October 18, 1960. The method of collecting the fund from the PMA membership was reserved to PMA.

In January 1961, a committee of PMA studied alternative methods of assessing members for collection of the "Mech" fund. The majority of the committee recommended that all members be assessed on a straight percentage of tonnage carried with bulk cargoes assessed at 1/5 the general cargo rate as was the practice with respect to the assessment of a part of the PMA dues. This determination was based upon the feeling that an assessment geared to "man-hours" would unfairly result in least assessing those who had profited most from new and improved cargo handling methods. A minority report recommended a combined man-hour/tonnage method of assessment, as was made with respect to PMA dues. The minority reasoned that such a formula would not unduly favor

those who would save most in man-hours. At the same time it would not unduly penalize those who would benefit most from the elimination of restrictive work practices. The majority position was adopted by PMA.

On November 15, 1961, a "Supplemental Agreement" effective January 1, 1961, was executed by ILWU and PMA ratifying the agreement of October 18, 1960.

[3] The tonnage formula has remained in effect since January 16, 1961, when payment to the fund began, although the amounts were increased in December 1961, from 27½¢/ton to 28½¢/ton on general cargo and 5½¢/ton to 9¢/ton on bulk cargo. An additional assessment of members based on 15 cents per clerk-man-hour was made at this December meeting and was added by respondents to their charges against VW which bore it without protest.

Subsequently, in July 1962, the rate of assessment on coastwise lumber was reduced to 5¢/ton on the theory that such cargo was already subjected to penalty handling rates of $1.00/hr. straight time and $1.50/hr. overtime.

Volkswagen had persistently refused to pay respondents "Mech" fund assessments which they here found necessary to pass on to it in order to carry on their operations on a profitable basis. The vast majority of the carrying of Volkswagen on the Pacific Coast (75 percent) are by vessels chartered by VW, and at the terminals of respondents 90 percent of all autos unloaded are those of complainant. A common carrier carrying complainant's autos, Wallenius Line, also protested and refused to pay the "Mech" fund assessments passed on to it.

Respondents and other terminal operators sought to have the form of assessment on automobiles modified. PMA had required the automobile tonnage assessment to be based upon measurement tons, rather than weight tons, regardless of how manifested. There is no uniform way of manifesting automobiles. In the foreign trades they

are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight. General cargo is assessed as manifested. This form of assessment increased Volkswagen's cost of discharge some 25 percent. The tonnage portion of the dues of respondents on automobiles had, since 1958, been assessed on a measurement ton basis.

[4] At the PMA meetings of January 1961, respondents expressed their opinion that it would be impossible for them to absorb the "Mech" fund assessments, and it appears that the stevedore members of the PMA in general felt that they could not absorb the whole assessment. Although some stevedores indicated that it might be necessary to pass on the assessment in the stevedoring rate to their customers, several witnesses, both for respondents and PMA, testified that there was no understanding among the PMA members as to whether the assessment would be passed on to the customers or absorbed by the members themselves.

The Funding Committee of PMA in February 1961, reaffirmed its position with respect to automobiles, and this was adopted by the Board of Directors in March of 1961.

Several stevedores, including respondents, attacked the method of assessing automobiles as arbitrary and suggested a unit method of assessment. The Funding Committee rejected the proposal in December 1961, and the rejection was affirmed by PMA in March 1962.

Respondents concede that the method of assessment against automobiles on a tonnage basis is unfair, as stevedoring of cars has always been an efficient and economical operation, and testimony in the record shows that there is little likelihood of mechanical improvement in the method of unloading automobiles, and auto shippers will probably

receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

Aware of Volkswagen's dissatisfaction, respondents some time afterward offered Volkswagen a lower rate whereby respondents would absorb an amount equal to that if the assessment had been made on a weight ton basis. Volkswagen rejected this offer and stated it would not pay the "Mech" fund charge in the rate if it were based on a measurement ton basis. Since Volkswagen was satisfied with respondents' discharging operations, Volkswagen continued to use them.

[5] Testimony indicates that stevedore members of PMA passed on the "Mech" fund assessments to common carrier members of PMA. The record also indicates that these carriers in turn absorbed the increases as it was stated that there was no increase in ocean freight rates due to the passing on to the carriers of the "Mech" fund assessments.

Some terminal operators may have absorbed the assessments in whole or in part, rather than pass them on to shippers when the services were performed directly for the shippers rather than for the common carriers. There is no showing as to the level of rates for terminal services charged by PMA members either before or after the establishment of the "Mech" fund.

PMA filed a libel against respondents in the United States District Court for the Northern District of California, Southern Division, demanding payment of unpaid "Mech" fund contributions from each respondent as a PMA member. By respondents' interpleader, Volkswagen was made a party to the Court action. Upon Volkswagen's request the Court stayed the proceedings therein, pending submission of the following issues to the Commission for determination:

> 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an

agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U. S. C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U. S. C. 815 (1961).

[6] 3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U. S. C. 816 (1961).

Thereafter Volkswagen filed the complaint in this proceeding alleging that respondents, other PMA members and PMA had conspired or agreed to impose an extra charge on Volkswagen for terminal services in discharging VW's in violation of sections 15, 16 and 17 of the Act.

The Examiner's Decision

The Examiner found that respondents, as parties to carloading conferences approved by the Commission and operators of terminal facilities were "other persons" subject to the Shipping Act, 1916. He further found that the "Mech" fund agreement which respondents had entered into with the other members of PMA, all of whom he found to be common carriers or "other persons" subject to the Act, was a "cooperative working arrangement." He concluded, however, that as the agreement contained no obligation upon the members of PMA to pass the "Mech" fund assessments on to shippers, the agreement was not the type

of "cooperative working arrangement" intended to be included within section 15 as it did not "deal with" or "pertain to" "ocean transportation" and was not one of "the same general class" as the six categories of agreements specifically enumerated in section 15.[1] He therefore found no violation of section 15 in PMA's failure to file its "Mech" fund agreement.

[7] The Examiner found no violation of section 16 as no "prejudice or disadvantage" to VW was shown by the method of assessment as all cars were assessed by the measurement formula.

The Examiner found no "unreasonable practice" under section 17 to exist with reference to the respondents' handling of Volkswagens as all autos were assessed on the same basis, Volkswagen never objected to the portion of the dues which was assessed on a measurement basis, and passed on to it, and respondents had offered to compromise the matter by absorbing a part of the assessment.

Discussion and Conclusions

We have reviewed the exceptions of Volkswagen to the Initial Decision of the Examiner. Even if we assume all of the members of PMA are "other persons" within the meaning of the Shipping Act, 1916, we find nothing in the agreements of record in this proceeding which brings them within the purview of section 15.

Although the literal language of section 15 is broad enough to encompass any "cooperative working arrange-

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[1] These are agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried. . . ."

ment" entered into by persons subject to the Act, the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives.[2] *D. J. Roach Inc.* v. *Albany Port District et al.*, 5 FMB 333, 335.

Thus, for example, while agreements of persons subject to the Act to pool secretarial workers or share office space may literally be "cooperative working arrangements," they are not the type of agreements which affect competition by the parties in vying to serve outsiders and hence are not [8] subject to section 15. On the other hand, agreements relating to the method of fixing or determining the levels of rates, fares, charges or commissions paid to or by shippers, passengers, forwarders, brokers, agents, etc., have the type of competitive relationship to bring them within the scope of section 15.

As the courts have pointed out, our statute ". . . In its general scope and purpose, as well as its terms, . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the questions under consideration, or dissimilarity in the terms of the act relating thereto, requiring a

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[2] Recommendations of the "Alexander Committee," Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under H. Res. 587, p. 415, *et seq.*—See also Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, on H.R. 4299, 87th Cong., 1st Ses. (1961) at page 428.

different conclusion." *United States Navigation Company, Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U. S. 474.

Section 5(1) of the Interstate Commerce Act (49 U. S. C. 5) provides for jurisdiction of the ICC over "Combinations and consolidations of carriers" establishing "Pooling, division of traffic, service, or earnings."

The courts, in construing this section, have determined that agreements which affect only labor-management relations do not come within its scope. A showing has been required, before labor-management agreements have been held to be subject to the jurisdiction of the ICC, that they have some impact upon the competitive relationship of those entering into them. "Section 5(1) empowers the Commission to exempt pools from the prohibition of the statute which it determines will not unduly restrain competition and will result in better service to the public or economy in operation, the broad sweep of the section does not encompass pools whose sole concern is labor-management relations." *Kennedy* v. *Long Island Railroad*, 211 F. Supp. 478, 489 (1962), affd. 319 F. 2d 366 (2d Cir. 1962).

It is not contested that the membership of PMA entered into an agreement as to the manner of assessing its own membership for the collection of the "Mech" fund. Such an agreement, however, does not fall within the [9] confines of section 15 as, standing by itself, it has no impact upon outsiders. What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators.

The record is devoid of evidence showing the existence of such an additional agreement. The record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers

is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment.

To hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement. We would moreover, be obliged to reach the anomalous result of finding an agreement in spite of both testimony and conduct negating such an agreement, and then finding that such conduct was a breach of the agreement. It seems much more logical and less contrived simply to conclude that there was no agreement on the part of the PMA members to pass on the "Mech" fund assessments.

We conclude, therefore, that no violation of section 15 has been shown.

Volkswagen itself admits that all of the relevant case law requires a showing that competitive cargo has been preferred to sustain an allegation of a violation of section 16. It further admits that its automobiles have not been subjected to "prejudice or disadvantage" as compared to other automobiles, and that "there is no other cargo classification in competition with automobiles." We therefore uphold the Examiner in finding no violation of section 16.

[10] Complainant's allegation of a violation of section 17 is that the passing on by respondents of the "Mech" fund assessment on automobiles on a measurement rather than a weight basis constituted an "unreasonable practice . . . relating to . . . the handling of property." It does not contest the propriety of the passing on of the assessment to it and states that the alleged discrimination would be removed if the assessment were made on a weight or unit basis.

It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Cooperage Co., Inc.* v. *Board of Commissioners,* 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.

The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund [11] assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

Report of the Commission

We agree with the Examiner that there has been no showing that the assessment against Volkswagen is an "unreasonable practice" within the meaning of section 17.

The complaint is dismissed.

Commissioner John S. Patterson dissenting:

Based on the record before me in this proceeding, my conclusions are as follows:

1. Respondents Marine Terminals have failed to file immediately (a) an agreement with common carriers by water and other persons regulating transportation rates and controlling and regulating competition among each other and (b) any memorandum of a cooperative working arrangement on the aforesaid subjects in violation of Sec. 15 of the Act. (Findings 1, 2, 3, 4 and 5)

2. Respondents Marine Terminals in conjunction with common carriers by water and other persons indirectly have subjected property and persons to undue and unreasonable prejudice and disadvantage in violation of Sec. 16 of the Act. (Findings 1, 2, and 6)

3. Respondents Marine Terminals have failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property contrary to Sec. 17 of the Act. (Findings 1, 2, and 7)

[12] As regards the conclusions stated above, the reasons in support of them and my dissent are advanced as follows:

INTRODUCTION

This proceeding was initiated by a complaint by Volkswagenwerk Aktiengesellschaft (VW) against Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (both referred to as "Marine Terminals"), alleging that Respondents Marine Terminals were parties

to an agreement with certain persons identified as both common carriers by water and other operators of terminal facilities to impose an "extra charge" for terminal facilities, including stevedoring and other terminal services. The "extra charge" was for the purpose of collecting "an assessment" imposed on Respondents by Pacific Maritime Association, of which Respondents are members, for contributions pursuant to a Supplemental Agreement on Modernization and Mechanization as hereinafter described.

The agreement to collect the extra charge was claimed to be subject to Sec. 15 of the Shipping Act, 1916 (Act), providing:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing, or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

Even after the agreement is filed pursuant to the first paragraph of Sec. 15, it is further claimed it may not be approved [13] pursuant to the second paragraph of Sec. 15 because the agreement is "unjustly discriminating and unfair as between shippers and importers, operates to the detriment of the commerce of the United States, is contrary to the public interest," (Complaint, VI), "subjects complainant and its automobile cargoes to undue and unreasonable prejudice and disadvantage" (Complaint, VII),

and "by establishing regulations and practices which are not just and reasonable" (Complaint, X. (5)), is contrary to law in violation of Secs. 15, 16, and 17 of the Act.

The complaint originated in response to an order of November 29, 1962, by the District Court for the Northern District of California, Southern Division, No. 28599 in Admiralty, granting a motion for a "Stay of Proceedings" on a libel petition on condition that there be a "submission to the Federal Maritime Commission and final determination by it, or by a court of last resort upon appeal from such Commission action" of the following issues:

> "1. Whether the assessments claimed from respondent impleaded are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U. S. C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
>
> "2. Whether the assessments claimed from respondent impleaded result in subjecting the automobile cargoes of respondent impleaded to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U. S. C. 815 (1961).
>
> "3. Whether the assessments claimed from respondent impleaded constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U. S. C. 816 (1961)."

[14] The Admiralty proceeding was initiated by the Pacific Maritime Association as a Libelant against Marine Terminals as one of the Respondents for refusal to pay

$67,004.27 assessments of contributions to a Mechanization and Modernization Fund created pursuant to the Supplemental Modernization Agreement. Marine Terminals petitioned to implead Volkswagen, stating the reason Marine Terminals had not made the assessed contributions was that VW contends that assessments under the Supplemental Agreement and Modernization and Mechanization "are unlawful and that neither libelant nor respondents can lawfully collect assessments pursuant to said Agreement". VW was impleaded and thereafter filed its complaint with us.

Pacific Maritime Association (PMA), which describes itself as "a non-profit association existing under the laws of the State of California", filed a petition to intervene in opposition to the complaint. The petition was granted.

The majority has dismissed the complaint and decided the Examiner should be upheld in finding no violation of Secs. 16 and 17 of the Act.

My dissent to the dismissal is set forth in the following facts, findings, and discussion in support of the findings and conclusions.

Facts

Because the content of facts as stated in the majority report are considered to be too meager a basis for decision, it is deemed essential to expand the scope of facts by advancing from the record before me the following 29 adequate statements [15] of fact upon which my findings and ultimate conclusions are grounded.

1. Complainant VW is a shipper of automobiles from the Federal Republic of Germany through United States Pacific Coast ports. Automobiles are shipped on both chartered ships in private carriage and on "liners" which are the same as common carriage. The number of VW automobiles imported through Pacific Coast ports during 1961 and 1962 were as follows:

	Common Carrier (Liners)	*Private Carrier (Charter)*
1961	9,363	29,111
1962	13,672	28,296

(Ex. 52)

2. Respondents Marine Terminals are in the business of furnishing ship loading and unloading and storage activities in their terminal facilities located at San Francisco and Long Beach, California (Tr., 202-206). Facilities are available and furnished to both common and private carriers (Tr., 203-204), but about 90% of Respondents' work is in connection with common carriers. (Tr., 236) Marine Terminals have provided facilities for VW since 1954 at both San Francisco and Long Beach. (Tr., 203-204)

3. a. Marine Terminals furnish the following to VW in connection with both common and private carrier by water shipments:

(1) unlashing and unchecking cars;

(2) removal of cars from ship to pier by means of a patent bridle device to pick up vehicles from the hold;

[16] (3) removal from shipside to storage area by means of tractors which push or pull, using special hooks, vehicles to the point of rest in the storage area; (Tr., 229-231)

(4) guard service, cleaning, lighting, heating, and maintenance of the terminal area; (Tr., 251-252)

(5) fenced-in storage areas where vehicles are surveyed, sorted into dealer lots, and made avail-

able for inland transportation by trucks. (Tr., 207, 231)
(Exh. 51)

The unloading services are performed by groups of laborers called "gangs" composed of ILWU members working both aboard the ship and on terminal property. (Tr., 207-208, 211) The men working on the docks are called the "dock gangs". They haul automobiles from the ship's side and sort the automobiles. The gangs working exclusively aboard the ships perform what is called the "function of the ship". (Tr., 206-207). Marine Terminals charged VW $10.45 per vehicle for the above services, regardless of model, size, or weight, during the period covered by the record. (Tr., 205, 207, 210, 214, 279)

b. A typical "work order" called for the following to be covered by charges:

"(1) Opening and closing of hatches, rigging and unrigging, opening of cardeck hatches.

"(2) Unlashing and unchocking of cars (Hercules round-lashings not to be cut but to be collected on board for further use).

"(3) Waiting time of 30 minutes or less whether in stevedores' control or not, but breakdown of ship's gear excepted.

[17] "(4) Travel-time and transportation of longshoremen and equipment to and from vessel.

"(5) Supply of discharging gear in accordance with Volkswagenwerk instructions.

"(6) 10 days free storage.

"(7) The stevedores will provide all necessary stevedoring labor including winchmen, hatch tenders,

tractor operators, also foremen and such other stevedore supervision as is needed for the proper and efficient conduct of work.

"(8) Checking, clerking and supercargo.

"(9) Public liability and property damage insurance, including third party risk, in respect of injuries arising from stevedoring operations, also taxes and Pacific Maritime Association assessments.

"(10) For handling cars from ship's tackle to place of rest $6,—per car are to be collected from consignees and credited to vessel within the disbursements account.

"REMARKS:

Wharfage on cars at $3,—per 2,000 lbs for uncrated cars to be for consignees' account."
(Exh. 51)

4. a. Marine Terminals is a member of PMA, intervenor herein, an association incorporated June 3, 1949, composed of members meeting the following qualifications as shown in its By-Laws as amended to April 1960 (Exh. 3), Article IV, Section 1:

"Section 1. Any firm, person, association or corporation engaged in the business of carrying passengers or cargo by water to or from any port on the Pacific Coast of the United States (except Alaskan ports), or any agent of any such firm, person, association or corporation, and any firm, person, association or corporation employing longshoremen or other shoreside employees in operations at docks or marine terminals at any such port and any association or corporation composed of employers of such longshoremen or other shoreside employees

shall be eligible for membership in this corporation."

The record shows 116 members meeting these qualifications for the year 1961. (Exh. 47—"Membership Roster")

[18] b. Intervenor PMA includes in its membership several common carriers by water such as American President Lines, Ltd., American Mail Line, Ltd., Matson Navigation Company, Pacific Far East Line, Inc., States Steamship Company, and United States Lines Company as American-flag carriers and many foreign-flag common carriers by water. (Exh. 47)

5. The corporate powers of PMA are "vested in and exercised, conducted and controlled by a Board of twenty-one (21) Directors, who need not be members of the corporation". Art. I) Among PMA's powers is the power to "levy and assess and collect . . . dues or assessments . . ." not in excess of a maximum rate to be fixed at a regular or special meeting. (Art. III, Sec. 1(e))

6. A Memorandum of Agreement on Mechanization and Modernization of October 18, 1960 (Exh. 1 sub B) between PMA and the ILWU provided that PMA would "establish a jointly trusteed Fund" (par. 38) to include specified amounts to be accumulated (par. 39). The purposes for which accumulations in the fund were to be used were stated (pars. 40-42). The terms of the Memorandum of Agreement were incorporated in a superseding "ILWU-PMA Supplemental Agreement on Mechanization and Modernization" (Modernization Agreement) entered into as of the 1st day of January 1961, signed for the Union on November 15, 1961, by Harry Bridges and for the Association by J. Paul St. Sure. The Fund provisions are as follows:

"1. *Amount and Rate of Accumulation.* Commencing January 1, 1961, and continuing for a period of five and one-half years ending June 30, 1966, a Mechanization [19] Fund shall be established, subject to the provisions of Section 3 of Article V hereof, at the rate of Six Million Five Hundred Thousand Dollars ($6,500,000) during the first year, Five Million Dollars ($5,000,000) during each of the next four years, and Two Million Five Hundred Thousand Dollars ($2,500,000) during the next succeeding six months, for a total of but not exceeding Twenty-nine Million Dollars ($29,000,000)." (Exh. I, Sub C, Art. II, par. 1)

7. The Modernization Agreement provides, with regard to contributions to raise the above amounts, "Principals who are Member Companies shall be responsible therefor to the extent the Association determines pursuant to its by-laws and in its sole discretion." (Id., Art. II, par. 2) Member Companies are defined in Art. I as companies who are members of the Association and are subject to several specified collective bargaining agreements "respecting employment of Employees." The "Association" referred to is PMA. (Id., Art. I, pars. 2 and 3) "Principals" are member companies "who do not employ directly Employees but who obtain stevedoring, terminal or similar related services under contracts . . .". (Id., Art. I, par. 6) "Contributions" are assessments required under "arrangements adopted by the Association, pursuant to its by-laws . . .". (Id., Art. I, par. 8)

8. For the purpose of adopting arrangements to discharge the responsibility to make the assessments needed to raise the specified contributions, PMA appointed a committee consisting of a representative from American President Lines, Ltd. (APL), Matson Navigation Company

(Matson), and Pacific Far East Line, Inc. (PFEL), operators of U. S. registered ships as "common carriers by water" as defined in the first section of the Act, [20] Holland America Line (Holland America), Union Steamship Company of New Zealand (Union), common carriers by water, and Overseas Shipping Company (Overseas) (status not clear in record). (Exh. 5) The committee's report on work improvement fund contributions procedures consisted of a majority report subscribed to by the Chairman on behalf of APL, Union, Holland America, and Overseas, and a dissent by Matson and PFEL. (Exh. 5, sub A)

a. The majority recommended an arrangement for dividing the costs of the ILWU Modernization and Improvement Fund set forth in the Memorandum of Agreement with the ILWU of October 18, 1960, whereby contributions to the fund are to be "based on cargo tonnage basis." (Exh. 5-A, p. 1) with an annual review by the Association to determine the equity of the formulas as conditions change. (Exh. 5, Sub A, p. 1) The report states, "the committee recommends that the contributions to the Fund be raised on a cargo tonnage basis . . .", but the committee's deliberations "centered on three methods of contribution . . . (1) contributions based on straight time man-hours of each employer, (2) contributions based on manifested cargo tonnage, (3) a combination of (1) and (2). In the text reference is made to "the same as the present tonnage formula" which is "the cargo is that manifested for loading or discharging at Pacific Coast ports". (p. 5) The "manifesting" qualification was an essential part of the committee's report which was adopted by the membership. (See also p. 7, referring to "the proposed charge on manifested tonnage". Whatever the manifest showed was to be the guide.) (Note: The costs of the fund are those [21] set forth in Article II, par. 1, of the Modernization Agreement which incorporated, with revisions, the provisions of par.

39 of the Memorandum of Agreement of October 18, 1960. The former Agreement was not drafted in final form and signed and sealed until November 15, 1961, but was entered into "as of" January 1, 1961. The committee report was dated January 4, 1961.)

b. The minority reported that the formula should be based on a combination whereby part of the fund would be accumulated by tonnage assessments and part by man-hour assessments with a 40%-60% proportion to begin with, subject to correction in the light of experience. (Exh. 5, Sub. B, 10-11)

9. The committee's majority report was considered by the Board of Directors at a meeting on January 6, 1961, and after "considerable discussion" of the committee's report "it was moved and seconded that the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months . . ." The Minutes show the vote on the motion was 12 "yes", 3 "no" and 3 "withheld", followed by the notation "Motion carried", and were subscribed by J. A. Robertson, Secretary. (Exh. 2-P)

10. The Board of Directors' action was considered by the membership at a meeting on January 10, 1961. Respondents were shown as "Present", represented by Messrs. C. R. Redlich and E. G. Horsman, along with representatives of about 81 members (not counting names of members appearing more than once) and staff personnel including the President of PMA. The Minutes showed the "three recommendations which had been made" as explained by the Chairman:

[22] "It was regularly moved and seconded that the Majority recommendation of the Committee ap-

pointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued study and be presented to the Membership again in six months.

"The Chairman explained the three recommendations which had been made:

1. *Majority Report* (on which the motion is based)

   26¾¢ on general cargo
   5½¢ on bulk

2. *Minority Report*

   10¢ a ton
   12¢ per manhour

3. *Board of Directors*

   20¢ a ton

"It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes."

followed by the notation that "a secret ballot was taken and the vote polled as follows:

246 yes

74 no

21 withheld

67 absent"

"Motion carried by a majority of the total voting strength [1] of the Association Membership". The Agreement of October 18, 1960, between PMA and ILWU was

ratified unanimously. The minutes were duly subscribed by the Secretary. (Exh. 2-0) As of January 1, 1961, all cargo is to be measured for assessment purposes on tonnages as shown in ships' manifests.

[23] 11. The record shows no challenge or question as to the regularity of the vote by either the directors or the members.[1] The By-Laws provide that any contract made by PMA on behalf of its members with a union "shall bind the members" except that any member who has not voted or otherwise approved a commitment can relieve himself by resignation within seven days from the vote thereon. (Exh. 3, Article XI, secs. 1 and 3) The record shows no resignations.

12. The Board of Directors at a meeting on January 16, 1961, adopted a motion "that unpackaged scrap metal . . . is to be classified as a bulk cargo . . . effective as of January 16, 1961" and agreed "that the tonnage declarations made by companies are to be made in exactly the same manner as manifested and reported during the year 1959. . .". This action had the effect of adding the "during the year 1959" qualification to the "as manifested" qualification. The minutes were duly subscribed by the Secretary. (Exh. 2-N)

13. The Vice President and Treasurer of PMA in a circular letter of February 3, 1961, wrote members on the subject, "Cargo dues—Tonnage—Automobiles", after noting automobiles were being reported on a weight basis: "Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a

[1] Members have different numbers of votes as prescribed in Article VI of the By-Laws. Votes at the membership meetings depend upon a formula which gives effect to the volume of cargo handled by each member at certain ports and to the number of personnel employed. (Art. VI, Sec. 1.)

measurement basis since January 1958 should immediately complete a revised tonnage declaration form: . . Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis". (Exh. 36) A February 24, 1961, communication to [24] "committee members", referring to a February 21, 1961, meeting of members, stated:

> "(4) The Mechanization Fund assessment for autos should be on a measurement ton basis, regardless of how manifested. 8 agree, none oppose." (Exh. 44)

As of February 21, 1961, the qualifications "as manifested" and "during the year 1959" disappeared and were replaced by "a measurement basis" in regard to automobiles only.

14. The Board of Directors at its regular quarterly meeting on March 8, 1961, approved changes (a) in assessments for full and empty "Army conexes" and (b) to provide that "coastwise cargo be assessed in the traditional manner at the rate of one-half the Work Improvement Fund rate for offshore and intercoastal cargo; that is, a single ton of coastwise cargo would pay a total of 27½¢ assessment, one-half at the point of loading and the other half at the point of discharge." The minutes were duly subscribed by the Secretary. (Exh. 2-M)

15. As of December 18, 1961, PMA reduced the tonnage assessment on lumber, logs, and automobiles to 24½¢, but added 4¢ for the Walking Bosses and Foremen's Mechanization Fund and an assessment of 15¢ per man-hour "on all ship clerk hours". (Exh. 56, meeting 12-13-61)

16. The minutes of the annual meeting of members on March 13, 1961, show unanimous ratification "of all

actions of the Board of Directors and Association Committees during the year 1960". The minutes were duly subscribed by the Secretary. (Exh. 2-L) The minutes of the meeting of members on May 14, 1962, show "that the Membership action of March 14, [25] 1962 [the defeat of the motion ratifying all action of the Board of Directors and Association Committees during the year 1961] be and hereby is rescinded and that all actions . . . during the year 1961 be ratified." The motion was carried and on another vote was "made unanimous", and the minutes were duly subscribed by the Secretary. (Exh. 2-G)

17. The minutes of the Directors Meeting on July 3, 1962, show a motion unanimously carried that "the contribution rate on all lumber moving in the coastwise trade shall be $.05 per ton, 2½¢ of which is paid at the port of loading and 2½¢ at the port of discharging". The minutes were duly subscribed by the Secretary. (Exh. 2-F)

18. The minutes of the Directors Meeting on December 12, 1962, show a motion unanimously carried "that the contribution rate to the Walking Boss Mechanization Fund be 2¢ per ton effective January 1, 1963" instead of 4¢ per ton as before. The minutes were duly subscribed by the Secretary. (Exh. 2-D)

19. At the annual meeting of the members of PMA on March 14, 1963, "all actions of the Board of Directors and Association Committees during the year 1962" were ratified by motion "unanimously carried". The minutes were duly subscribed by the Secretary. (Exh. 2-A)

20. The several "actions", resolutions, and adopted motions of members of PMA were acted on by those members providing terminal facilities and wharfage, including Respondents, by charges to VW and other users by seeking

collection from shippers and by being billed separately by Respondents. (Exhs. 9, [26] 23, 32) One member of PMA informed a PMA official that the cost of the assessment on automobiles is so much greater "as compared to the stevedoring cost" that it could never be considered that the cost would be absorbed. (Exh. 24) The Committee considering the assessments itself knew shippers would be asked to pay in expressing a belief the measurement did "not work an inordinate hardship on the shipper." (Exh. 27) The entire membership considered (a) "the problem of collecting funds from Volkswagen due the Mechanization Fund" at one of its meetings (Exh. 2H) and (b) a recommendation to establish "an escrow account for payments by stevedores on behalf of Volkswagenwerk". (Exh. 2C)

21. a. At the meeting of the Board of Directors of PMA and American Flag Operators, July 3, 1962, after noting that companies handling Volkswagens "had made no contribution to the Mechanization Fund" (p. 5), a motion to approve a recommendation of the "Coast Steering Committee" was unanimously carried to modify a previous action so as "to provide that PMA counsel assist Marine Terminals (and other stevedoring companies handling Volkswagens) only if the action by or against Marine Terminals raises issues which jeopardizes the Mechanization Plan or other interests of the industry. . .". (p. 6) (Exh. 2-F)

b. The previous action was taken at the meeting of the Board of Directors, December 13, 1961, wherein "it was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel". The support and action referred to [27] "the problem of collecting funds from Volkswagen due the Mechanization Fund" and a

request by respondents "that they be authorized to bring suit against Volkswagen for the monies due". (Exh. 2-H, p. 4)

22. The facilities used by VW were initiated by means of a "Stevedoring Order" which described the contents of the arriving ship and the work to be paid for. (Exh. 36)

23. Respondents were required to prepare a "tonnage declaration form" (Reports of Tonnages) and to send it, together with "a check for contributions to be in the Association's hands *not later than the 20th of the month following the month in which such cargoes are handled.*" (Exh. 35, item 7) The foregoing was dated January 17, 1961. A further instruction to members, including Respondents, over the signature of the Vice President & Treasurer of PMA on March 16, 1961, stated: "We again wish to reiterate the fact that this contribution is a contractual commitment, exactly the same as welfare, pension and vacation contributions, and should be paid into the Association not later than the 20th of the month following the month in which such tonnages were handled". (Exh. 55, p. 2)

24. Respondents, acting by their Vice President, discussed the problem of the assessment on automobiles with other companies who handle them on the Pacific Coast, and none thought it was possible for members to absorb the assessment. (Tr., 239) The matter was also discussed at PMA meetings. (Tr., 240) It was the uniform opinion of the contracting stevedores with whom the Vice President talked that the assessment could not [28] be absorbed by members when on a measurement basis. (Tr., 241) No agreement was reached as a result of the discussions as to how assessments would be collected, it was stated (Tr., 247), but as a result everyone subject thereto did the same thing by using the same measurement, but not paying the result-

ing assessments on Volkswagens brought in under contract carriage. (Tr., 209-270) After VW refused to pay the amount of billings representing the assessment on a measurement basis, the Respondents and members of PMA refused to pay their assessments, and so did Waterman Corporation of California, agents for Walleniusrederierna. (Exh. 9) Respondents stated they "are merely following out the instructions of the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter" and asked for instructions as to "what stand we can take in demanding payment of this assessment." (Exh. 9) Associated-Banning Co. had asked PMA officials for instructions on how to handle refusals to pay assessment charges (Exh. 11) after Waterman Corporation of California, agents for Wallenius Line, stated they would pay only on a unit basis as manifested in 1959 (Exh. 12), not on a measurement basis. Respondents discussed assessments with an official of PMA. In a letter to the official, Respondents' Vice President noted the official "was aware of what was behind." Respondents "not making certain payments into the plan, but nevertheless, you had to protect yourself by writing the letters referred to above". (Exh. 13) The "letters" were demands for payment of assessments.

[29] 25. Automobiles are assessed by a measurement ton measure rather than by a unit or weight measure. Comparative measures are as follows:

	Weight	Measurement
Sedans	1,643 lbs = .8 wt. ton	7.8 cubic tons
VW Transporters	2,193 lbs = 1.1 wt. ton	11.4 cubic tons* (Tr., 281-282)

Other figures show:

Sedans	1,609 lbs = .8 wt. ton	8.3 cubic tons
VW Average (tons approximate)	2,028 lbs = 1.0 wt. ton	10.0 cubic tons (Exh. 7)

(*Note: Exh. 7 shows for Transporters 2447 lbs and 11.8 tons and different average.) Roughly, the average assessment on Volkswagen vehicles would be about 10 times as as high as on a measurement tonnage basis than on a weight ton basis. The measure applicable to Complainant's property was estimated to be at a level from 10 to 15 times higher than the measure for assessing other general cargo. (Exh. 7, p. 2, par. 6)

26. The assessment applicable to automobiles was stated to increase the cost of handling by from 33⅓% (Exh. 25) to 35% (Exh. 9). Another estimate was that the increase caused by the new measure was about 22% in the case of sedans and 31% in the case of transporters. (Exh. 26) Another estimate was "more than 26% in discharge costs" of Volkswagens. (Exh. 7) These estimates were not refuted. In contrast, the estimated average increase in the "discharging costs" or "cargo handling expenses" of packaged general cargo resulting from the assessment [30] was 2.2%. (Exh. 7 and Exh. 26, p. 2) The measurement ton measure causes a $2.76 per vehicle charge in comparison with a 28¢ per vehicle charge on a weight ton measure. The longshore cost is $10.45 per unit. Lumber is assessed on a unit measure based on 1,000 board feet per unit at the rate of 2½¢ per manifested ton. (Exh. 26, p. 2) Unboxed automobiles are normally handled for charging purposes between factory and distribution on a unit basis. (Exh. 26, p. 2)

27. The man-hours necessarily employed in handling Complainant's property, unboxed automobiles, always have been less than practically any other commodity. (Exh. 26) The mechanized handling of packaged general cargo may effect savings, but because of past improved handling methods no new practical application of mechanization to the discharge of unboxed automobiles is visualized.

(Exh. 7) Automobiles will benefit less from mechanization than other cargo. The average direct labor cost, without fringe benefits, of discharging Volkswagen vehicles was 49¢ per measurement ton as compared with the 27½¢ measurement ton assessment. The assessment is 56% of the average direct labor cost. (Tr., 284) In 1962, 28½¢ was the assessment, or 58% of the average. The total direct longshoremen's labor cost of all PMA members in 1962 was $103,953,362, and total fund assessments were about $5,200,000 (Tr., 285, Exh. 49), or an assessment of 5.8 of the total direct labor cost ("wages"). (Tr., 284)

28. For Volkswagen vehicles transported in chartered ships, the manifests and bills of lading show the number of automobiles [31] and the weight in kilos. No specific rate or total freight is shown being noted by the endorsement "freight prepaid" or "freight as agreed". Contracts for freight are based on a rate per automobile unit. For the same reason, unloading charges are customarily on a unit basis. (Exh. 7)

The intercoastal freight rate structure is on a weight basis, i.e., not measurement, and the reporting and levying of a tonnage assessment for automobiles is on a unit of 2,000 lbs. (Id., and Tr., 222-223, 288-290, 313) The California State wharfage on unboxed automobiles is based on a weight ton of 2,000 lbs. (Id.) Volkswagen vehicles are manifested for purposes of common carrier (liner) shipments on a unit basis of measure. (Id., and Exh. 12) Many automobile manifests show weight, but some show measurements also. (Tr., 323-324)

29. Any property other than automobiles would be measured for assessment charges on a manifest basis even where the per ton charge is less. (Exhs. 7, 44)

Report of the Commission

FINDINGS

1. Complainant VW is a shipper of property consisting of automobiles on common carriers by water in foreign commerce and on private carriers through exportation from the Federal Republic of Germany (Germany) and importation into the United States, and obtains and uses the facilities of Respondents.

2. Respondents are persons carrying on the business of furnishing warehouse or other terminal facilities in connection with a common carrier by water and each is an "other person subject to this act" as defined in the first section of the Act.

[32] 3. Respondents have entered into an agreement with other common carriers by water and with other persons who are carrying on the business of furnishing wharfage and terminal facilities in connection with common carriers by water that they will regulate transportation rates and control and regulate competition among each other by establishing uniform charges which Complainant and others must pay for unloading and storage services, as a part of wharfage and terminal facilities, measured by the tonnages of property handled.

4. Respondents have provided for a cooperative working arrangement by agreeing to assess themselves in accordance with PMA directives and to pay assessments into the Mechanization and Modernization Fund. Assessments and payments are collected by charges for facilities supplied to Complainants.

5. Neither a true copy of any agreement regulating transportation rates and controlling and regulating competition, nor any memorandum of the cooperative working arrangement has been filed with the Commission.

6. Respondents, in conjunction with other persons, members of PMA, by measuring the assessment of the amounts they are obligated to pay into the Mechanization and Modernization Fund, using a measurement ton regardless of how manifested for automobiles, but a revenue ton (i.e., whatever type of tonnage used to compute freight charges) as manifested for other cargo, and by adopting special rules for certain other property, indirectly subject the property automobiles and the particular person Complainant VW to undue and unreasonable prejudice and disadvantage.

[33] 7. Respondents' regulations and practices relating to and connected with receiving, handling, and delivering property consisting of automobiles are unjust and unreasonable insofar as such property is required to be measured differently, for the purpose of Mechanization and Modernization Fund assessments, from other property, with the result that such property bears a disproportionately high share of the cost of unloading when the assessment costs are included as part of Respondents' charges for facilities and services furnished to Complainant.

DISCUSSION

Introduction:

Respondents' Answer does not deny the status of Complainants as exporters of automobiles from Germany and as importers thereof into the United States, nor that Respondents are engaged in foreign commerce. (Answer, par. II) Respondents admit that they are in the business of furnishing terminal services in connection with common carriers by water, but deny that terminal services were furnished Complainant in connection with a common carrier by water or that the Commission has jurisdiction over them as terminal operators. (Answer, par. III) Re-

spondents admit they have included as part of their charges for services the amounts of assessments under the Supplemental Agreement on Mechanization and Modernization. (Answer, par. IV) Respondents deny anything they have done violates any provisions of the Act (Answer, pars. V, VI, VII, and VIII), but admit the statements regarding the action in Admiralty before a United States District Court and deny the Commission's jurisdiction with [34] respect to the matters alleged (Answer, pars. IX and X). The facts admitted will be accepted without further discussion, particularly the fact that Respondents have passed on to Complainant in their charges and billings the agreed-upon assessments which produce the money for the Mechanization and Improvement Fund. Wherever services are rendered, it is considered that such services are part of the total facilities furnished by Respondents. (See cases cited below) Herein the term facilities includes services.

Respondents' three major denials are:

First, they are not persons subject to the Act, at least with respect to the activities involved.

Second, no unfiled or unapproved agreements of the type described in Sec. 15 are involved.

Third, they have not violated any other provisions of law in Secs. 16 or 17 of the Act.

Reasoning in Support of Findings:

Sec. 22 of the Act creates a right in "any person" to file a complaint setting forth a violation of the Act "by a common carrier or other person subject to this Act."

The facts in items 4, 5, and 9 through 19 establish that PMA members are both common carriers by water and other persons and that their activities which are the subject of this proceeding have all been taken after following

correctly the procedures of their agreements of association and have all been duly authorized and carried out pursuant to such authorizations. There is no question herein as to unauthorized acts or agreements, [35] nor that Respondents are not fully aware of, and responsible for, each action.

1. *Persons subject to the Act.*

There is no denial of Complainant's status as "any person", referred to in Sec. 22, but Respondents deny they are an "other person" under the first section of the Act because their activities are limited to the stevedoring of chartered ships; neither wharfage, warehouse, or terminal facilities, nor facilities in connection with a common carrier by water are the subject of the proceeding; and, therefore, the law does not apply to them.

The denial is not supported. The facilities furnished to the Complainant and furnished to the public are far more comprehensive than stevedoring services. Stevedoring is combined with the furnishing of all kinds of terminal facilities. The services range from the opening of hatches to towing cars to storage areas and require the furnishing of many kinds of equipment such as towing tractors and other gear. The fact that VW's order is titled "Stevedoring Order" does not control what happens after the order is issued. Complainant's order to Respondents explicitly refers to charges covering the supply of discharging gear, 10 days' free storage, public liability and property insurance, and wharfage on cars. As part of its non-stevedoring facilities, Respondents furnished motor-driven tractors and bridling devices and guard service, lighting, and cleaning for their storage spaces. Respondents may also be considered as furnishing warehouse facilities to the extent [36] they furnished a parking lot pending collection of the cars by dealers even though there was no roof over, and walls surrounding, the cars as would be the case with a traditional warehouse.

A PMA official testified that longshoremen employed in terminal operations were to benefit equally with those involved in stevedoring work (Tr., 106-107, Exh. 5A, p. 7), thus admitting more extensive operations. The Commission's predecessors have held that persons furnishing hand trucks, flat top trucks, lift trucks, switch engines, and the labor required to operate such equipment are "other persons and the furnishing of stevedoring and terminal services constitutes a "facility". *Status of Carloaders and Unloaders,* 2 USMC 761 (1946) and *Carloading at Southern California Ports (Agreement No. 7576),* 2 USMC 784 (1946). Where stevedoring has been combined with furnishing terminal facilities, the Commission has assumed jurisdiction and been sustained. *Greater Baton Rouge Port Comm'n* v. *United States,* 287 F. 2d 86 (5th Cir. 1961) *Cert. denied,* 368 U. S. 985 (1962).

Respondents concededly furnished terminal facilities in connection with other common carriers by water and about 90% of their business is done for common carriers. Of this business Respondents furnished Complainants the use of their facilities in connection with the common carriage of some of the 9,363 vehicles in 1961 and 13,672 vehicles in 1962, shipped through Pacific ports, and made its facilities available at all times to importers, regardless of how the vehicles were shipped.

[37] In *California* v. *United States,* 320 U. S. 577 (1944), the Supreme Court sustained jurisdiction over terminal operators in their relations to all carriers and shippers, stating (at 586):

> "And whatever may be the limitations implied by the phrase 'in connection with a common carrier by water' which modifies the jurisdiction over those furnishing 'wharfage, dock, warehouse, and other terminal facilities,' there can be no doubt that wharf storage facilities provided at shipside for cargo

which has been unloaded from water carriers are subject to regulation by the Commission. * * *"

Jurisdiction depends on status. Respondents' status is that of an "other person" subject to the Act within the meaning of the first section, because their status is fixed once the connection with a common carrier is shown and does not shift to divest from time to time, depending on whether or not the warehouse or terminal facilities are furnished for a common carrier. Respondents' acts in connection with common carriers—not conformity with other sections of the Act besides the first—fix their status or classification.

Findings 1 and 2 are supported.

2. *Unfiled Agreements.*

The record shows, first, there was an agreement that the collection of assessments for the Mechanization and Modernization Fund were to be made from users of members' services; and, second, the subject matter of such agreements is covered by Sec. 15 of the Act.

First, each Respondent as an "other person subject to this act" and the members of PMA, consisting of common carriers by water and other persons furnishing terminal facilities, [38] adopted motions, resolutions, and other actions prescribing their future conduct, and performed acts in accordance therewith. The Modernization Agreement to which respondents as members of PMA are a party expressly provides for collection of assessments under "arrangements adopted" pursuant to the PMA by-laws. (Fact No. 7) Agreements under Sec. 15 include "other arrangements", and this is one of them. Respondents were present at meetings and voted on the necessary resolutions to implement the Modernization Agreement. By these actions, Respondents became parties to an agree-

ment and conformed in whole and in part with such agreements. Respondents understood and acceded to the directives of the Board of Directors and of the PMA officers, guided by approved committee reports, all of which were duly authorized in accordance with constitution and by-law requirements finding on Respondents. The majority committee report was adopted after "considerable discussion" and so was well understood. Sec. 15 explicitly makes the term "agreements" include "understandings". Each action involved an understanding as to what was to be done, followed up by action. The Respondents were parties to all the agreements evidenced by the minutes of meetings and written communications from the directors and officers. Part of these understandings was that collection of the assessment would be from members' customers.

The majority believes the agreement as to the manner of assessing its own membership does not fall within Sec. 15 because "standing by itself, it has no impact upon outsiders." It is hard to take this assertion seriously. In the first place [39] there is no "impact" test to determine whether an agreement falls within Sec. 15. In the second place this statement seems to say that assessments totalling $29,000,000 have no impact upon persons who will provide this amount of money. To make the agreement to assess stand by itself apart from how and from whom it is to be collected ignores significant realities. If the agreement to assess really stood by itself, apart from any agreement to collect, and had no impact on outsiders, there would have been no need for members, including Respondents, to ask for instructions or authorizations when the outsiders refused to pay, nor for the refusal of Respondents, other terminal operators, and stevedores to refuse to pay the assessments. If the agreement to assess truly stood "by itself", each member would be honor bound to pay, no

matter what happened. The claimed lack of agreement about collections is contradicted by the fact that everyone behaved as though all understood the assessment would be collected from outsiders such as Complainant and failed to pay after seeking instructions when VW refused to pay. The correspondence shows a general understanding that PMA members were only collection agents, and when shippers ("outsiders") refused to pay, the members need not pay. Their own concept as agents implies agreement and precludes adverse interest. The collection method was communicated to PMA officials and was discussed at meetings, attended by most of the members, in terms which conveyed an understanding that all had arrangements to have the amounts needed collected from users of members' services. The exact method each would follow [40] to collect the money may not have been discussed, but it was understood that all would use the same measure and obtain the product of its use from customers. The evidence showed other terminal operators had done the same thing after discussion on the subject. The fact that some may not have segregated their charges the same as Respondents or stated them separately on a piece of paper does not negative the evidence and eliminate the fact of agreement to include the charges. Anyone who has expenses relating to the assessment would normally reflect his expenses by charges creating someone else's costs without agreement, but it might not be done after deciding on the same measure as here, nor after consultation, nor in accordance with instructions as to what to do if it didn't work, nor in agreement as to how to conduct litigation if this became necessary. Recognition of the understanding was shown in the letter referring to the "need to protect yourself by writing" letters asking for payment of overdue assessments. The letter preserved the appearance of rights, rather than made serious demands. The protection only concerned the

need to dissemble the fact that the customers of respondents were being billed for the assessments in one form or another and payment of assessments by respondents would not be made unless the customers paid. One of the officers of PMA stated the intent of all members that the obligations to pay were a "contractual commitment", but it was clear actual payment depended on collections. There was only one practical way the commitment could be implemented, and this was well understood to be through payments by customers of respondents.

[41] Supplementing the evidence of an agreement to regulate rates and competition are the actions taken to select counsel to enforce collection of assessments. At a meeting on May 14, 1962, it was "agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel". The agreement was in response to a request by respondents that PMA give support "on the Volkswagen suit". The suit was referred to in "a communication from the Funding Committee covering the problem of collecting funds from Volkswagen due the Mechanization Fund". The funds were not considered to be due from Marine Terminals. This shows clearly the understanding of everyone that VW and other shippers, not the members, were to pay the money "due the Mechanization Fund" and members were collecting agents. Inability to collect from "outsiders" rather than from members was understood to be a shared "problem".

Later there must have been belated recognition of the perils of this action, because it involved PMA counsel in representing both the creditor PMA and the defaulting debtor member such as respondent Marine Terminals who refused to pay his "contract commitment" assessment. The appearance that the assessment was due from members was all that had to be preserved, not the real claim. There-

after, it was provided "that PMA counsel assist Marine Terminals Corporation (and other stevedoring companies handling Volkswagens) only if any action against Marine Terminals raises issues which jeopardize the Mechanization Plan or other interests of the industry. . :" [42] PMA reserved the right to institute action against members still in default, by shifting to a limitation on actions.

It is not apparent how the shift takes the curse off the embarrassment involved in representing adverse interests because jeopardizing issues could arise in a debt action. The evidence underlines the point that respondents and PMA understood they were working together in a non-adversary arrangement to collect money due from "outsiders" rather than from members. Normally, even jeopardy to the Mechanization Plan would not justify such an understanding where some one has failed to meet a "contract commitment". It took a special understanding to alter normal conduct. Their initial spontaneous actions point to common understandings and arrangements to work together in effecting collections from shippers in spite of a conflicting debtor-creditor relation between PMA and its members, and only their afterthoughts point to an understanding that the adversity must be preserved, but only where the Plan was not jeopardized. Both actions were preceded by agreement in any event. After agreement there was modified conduct in recognition of the adverse interests and separate counsel were retained when the admiralty action was initiated when all other action had failed to make the outsider VW rather than the members pay up without question.

Sec. 15 is explicit that the "term 'agreement' in this section includes understandings, conferences and other arrangements."

[43] Respondents concede in their answer that they "admit that they have included as part of their charges

for services the amounts of the assessments . . ." and the evidence supports the finding that they did so as the result of a common understanding, agreement, or working arrangement.

The majority disposes of this evidence by stating the record is devoid of evidence showing an additional agreement. Perhaps a court will decide the evidence is not adequate to prove the complaint contrary to my position, but absence of evidence will not be the reason for rejecting the complaint. The Administrative Procedure Act in Sec. 8(b) directs us to provide a statement of the reasons or basis for our conclusions. The directive is not satisfied by such a succinct disposal of all this evidence. The reasons or bases are thought to be supplied by stevedores' opinions and explicit statements to the contrary. In my opinion, this evidence is overcome by other statements and deeds showing agreement to pass on the assessments, but, whatever the outcome may eventually be, the majority should not pretend the other evidence does not exist and accept such self-serving statements without also substantiating the statement and overcoming the evidence which complainants presented with reasons showing non-contradictory effect. The characterization of the majority position as "more logical and less contrived" does not supply the deficiency of reasons or basis for the "devoid of evidence" ruling.

Second, the subject matter of the agreements is related to the subjects of Sec. 15. Sec. 15 requires that the subject [44] of agreement be related to "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or special privileges or advantages; controlling, regulating, preventing, or destroying competition . . . or in any way or in any manner providing for an exclusive, preferential or cooperative working arrangement." The subject matter of the agreements was (a) the measurement of the property using the terminal facilities,

in accordance with the agreed guiding regulations, and (b) the method of collection of the charges calculated after making the measurement. Both regulated or controlled rates and competition.

The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to pre-existing rates for terminal facilities. Respondents had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure. The facts showed further that all operators got together and decided they could not absorb but would pass on the assessment applicable to automobiles, and PMA's members themselves agreed to impose the charge. Respondents' lawyers were under no illusion about everyone's understanding or contemplation when they wrote with reference to the Supplemental Agreement between PMA and ILWU effective January 1, 1961:

> "It was contemplated that these assessments, as added stevedoring or terminal costs, could be added to the charges of the stevedore or terminal companies."

[45] The agreement on the conduct of litigation shows how important the method of collection was on rates. If it is understood respondents need not pay assessments unless they or PMA can collect separately, rates will be regulated at a lower level than if assessments are a cost of business which Respondents must pay as a debt whether collected or not. Accordingly, these agreements regulate rates, depending on which course of action is followed. Granted there was plenty of ambiguity in the method of collection to be followed as shown by the shifting positions taken, but the fact of change itself shows a prior understanding

that rates were to be regulated after each change. The high level of charges from the automobile measure and the large number of automobiles imported caused large sums of money to be involved. This situation created extreme pressures to prevent the "contract commitment" advice from being taken too seriously and to devise methods of collection which would not disrupt members' rates which would occur if the assessment were truly a debt of the members. The alteration of normal conduct and temporary confusion as to the niceties of selecting counsel disclosed an understanding of how Respondents' rates would be affected, depending on whether Respondents were debtors or PMA agents for collecting the assessment. In the former case the credit of PMA members and PMA power over them protected the Fund; in the latter, only the credit of a much larger number of shippers.

The increase in charges constitutes a regulation of transportation rates, and the combined activity of Respondents [46] and other terminal contractors and stevedores in agreeing to not absorb the assessment, as well as their activities as members of PMA, constitutes a control and regulation of competition.

Confirmation of the control of competition is supplied by generalized business considerations. If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control.

The fact that the increased charges may have applied only to non-common carriage is not material, because the common carrier test applies to fixing the status of persons defined in the first section of the Act and does not exclude

activities and property from the law's protection. The fact that the combined activities resulted in an understanding to collect by passing on assessments in the form of higher transportation charges and to make them apply to property transported in non-common carrier service does not absolve the actor once he is classified as an "other person". Validating absolution would make identical activity in relation to identical property have different consequences under the law, depending on the status of the ship carrying the property before it reaches the Respondent. Under the first section, the status of Respondent is fixed [47] by his acts before the ship reaches the terminal facilities. Legal conclusions involving Secs. 15 or 16 must be based on status ascertained before the actions complained of, not on common carrier vs. non-common carrier refinements ascertained afterwards.

The majority seeks to avoid the consequences of reasoning by referring to the "literal language of section 15" relative to a "cooperative working arrangement" and stating the terms of Sec. 15 were qualified by Congress by means of legislative history "to apply only to those arrangements" which affect "competition". The terms are also thought to be qualified by associating them with agreements to pool secretarial workers or to share office space and agreements which affect only labor-management relations. The latter was interpreted by a court not to be covered by a provision of the Interstate Commerce Act relating to combinations and consolidations of land carriers.

Sec. 15 is sufficiently explicit and need not be compared with unrelated laws or interpreted to limit the subject to cooperative working arrangements and "competition" in disregard of other provisions in Sec. 15. My decision is also based on the other terms and on the understandings and arrangements, cooperative or otherwise, relative thereto. Far from finding the record "devoid of evidence showing the existence of such an additional agreement" to pass on assessment expenses, I find the record amply supplied with

evidence on such an agreement and its relation to the subjects referred to in the first paragraph of Sec. 15.

[48] Finding No. 3 is supported.

The acts of Respondents and others following their agreements to assess themselves in response to the adoption of the PMA resolutions and motions and the issue of PMA directives consisting of using the measurement tonnage measure on automobiles and collecting the amounts found to be due by passing on the necessary expenses equally constitute a cooperative working arrangement. Respondents and other PMA members all worked together in doing the same thing pursuant to their prior arrangements. Contributions are referred to in the By-Laws as being required under "arrangements" of PMA. Everyone "contemplated" doing the same thing. The same reasoning applies here to support the finding as was applied to the preceding part of Sec. 15.

Additionally, when VW refused to pay on billings including the assessment, the Respondents and other PMA members affected thereby refused to pay assessments. Wallenius Line, a common carrier but not shown as a member, also refused to pay. (Tr., 324) This action constitutes evidence of an understanding and a cooperative working arangement, (a) to charge persons such as Complainants for the amount of assessments and (b) to relate the payment of the assessment directly to the Respondents' ability to collect the charge pursuant to the arrangement. If the amount could not be collected, the assessment would not be paid.

Under almost identical "cooperative working arrangement" language of Sec. 412 of the Federal Aviation Act, 1958 (49 [49] U. S. C. § 1382), the Civil Aeronautics Board held that the establishment of an employer collective bargaining association of carriers was a cooperative working arrangement which had to be filed. *Airlines Negotiating Conference Agreements*, 8 CAB 354 (1947).

Finding No. 4 is supported.

Report of the Commission

The obligation to file has been established above. The records of this office confirm that none of the agreements found herein to exist have been filed. A finding that the agreements and memorandums of arrangements have not been filed is thus supported without the need for further proof.

Finding No. 5 is supported.

3. *Other provisions of law have been violated.*

Sec. 16 of the Act makes it unlawful for any other person subject to the Act either alone or in conjunction with any other person, either directly or indirectly, to give any preference or advantage to any description of traffic in any respect whatsoever or to subject any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. A violation of Sec. 16 is complained of.

Two facts stand out in relation to preference, prejudice, or disadvantage:

First, the charges by Respondents to meet PMA assessments where automobiles are handled were measured by the measurement ton, regardless of how manifested, and no other property was measured by such a rule. Other property was measured according to the way it had been manifested in 1959. The use of the [50] measurement ton measure required a change from both earlier methods and from current practices in regard to automobiles, in comparison with measure of all other property for assessments as freighted or manifested. The measure depended on how freight charges were determined, except for automobiles. The Vice President, before February 21, 1961, when the "measurement" measure for automobile assessments officially went into effect, had claimed such a measure

rather than a tonnage measure had applied all along, at least since January 1958, but his claims never were adopted officially by PMA. All we have before February 21, 1961, is his personal assertion of what PMA should be doing rather than what PMA actually did. Somewhat inconsistently with the claim, letters regarding declaration forms refer only to "tonnages" in January and March 1961.

Second, the effect of the change in measurement and the different treatment was to make the traffic described as automobiles bear a substantially higher assessment charge: (a) about 10 times higher than if measured on a weight basis as shown in many manifests and as other cargo is measured, (b) from 22% to 35% higher in terms of unloading costs than other traffic described as packaged general cargo which bore a 2.2% increase as a result of the assessments, and (c) about 10 to 15 times higher than other general cargo.

Where exceptions were made for other descriptions of traffic, the charges were always lower: (a) lumber was measured on a unit basis for assessment charges, but automobiles were not, even though manifested in some cases on a unit basis and [51] there was a normal method of measuring other handling costs on a unit basis, and (b) Army property and coastwise cargoes received concessions.

All the concessions applied to property in domestic transportation, but the increased charges applied to automobiles imported from foreign countries.

Unboxed automobiles were shown generally to require less man-hours handling per unit than practically any other commodity, yet automobiles still paid more.

There is no explanation in the record to show why the different measurement method was applied to Complainant's property. The method was shown to deviate from measurement practices on the coast for other purposes.

The result of the measurement ton measure is that, in the words of at least two stevedoring companies, it is "not

based on practical considerations and has no comparison to other commodity assessments." (Exhs. 24 and 25) Still another stevedore referred to the measure as "discriminatory and is contradictory to over-all basis of assessing weights or measurement as freighted", i.e., as manifested. (Exh. 23) Other evidence showed that ever since Volkswagens were first shipped to the Pacific Coast in 1954, "they have been freighted on a unit basis, or on lumpsum FIO or time charter" and not only freight but terminal facilities have always been computed and paid at so much per unit. (Exh. 26) Another stevedore referred to statements that "establish the inequity of the effect of the present assessment to these vehicles on a measurement [52] ton basis . . . disregarding entirely the basis on which these vehicles are freighted, as well as the basis on which all stevedores on the Pacific Coast handle their contracts". (Exh. 16) In other words, established trade measurement practices have been disregarded in this one instance for no apparent reason and followed in the case of all other property. This action creates an unreasonable prejudice.

The result of the shift to measurement tons for automobiles made the increase applicable to property where "the man-hours necessarily employed in their handling always have been less than practically any other commodity". This was said to accentuate the percentage disparity in the cost increase. Others refer to the "undue burden on this one commodity". (e.g., Exh. 18) Such effect creates an unreasonable disadvantage.

There was not in 1959 nor at this time any uniform practice in manifesting automobiles any more than there was in 1959 with respect to other property, except that in the coastal trade automobiles are manifested and freighted on a weight basis and common carrier shipments of Volkswagens were and are most frequently manifested and freighted on a unit basis, although weights and measures may be shown. The treatment of automobiles cannot be

justified on the basis of any uniform traditional trade practice of using a measurement ton measure. This action creates a preference for other property and a prejudice to automobiles.

Because of the difference in the method used to measure Complainant's property, both in relation to other services for [53] automobiles and to other descriptions of traffic, and the resulting high increase in the economic effect caused by the departure from the usual measures, it is concluded that there has been preference and advantage to traffic other than Complainant's property and disadvantage and prejudice to Complainant's property. The actions have been indirect because the method used was to adopt the measure enforced by PMA in cooperative arrangement with other members.

Precedents of this agency have added to Sec. 16 the requirement of a showing that competitors have been meted out different treatment before undue prejudice in violation of Sec. 16 may be proven, *Afghan-American Trading Co.* v. *Isbrandtsen Co.*, 3 FMB 622 (1951) and *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland" et al*, 4 FMB 343 (1953), but others have held Sec. 16 was violated without any proof of disadvantage among competitors, *Absorption or Equalization on Explosives*, 6 FMB 138 (1960), *Swift & Co. et al*, v. *Gulf and South Atl. Havana Conf.*, 6 FMB 215 (1961), affirmed: *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (U.S.C.A., D.C. 1962). In *New York Foreign Frgt. F. & B.* v. *Federal Maritime Com'n*, 337 F. 2d 289 (USCA 2d 1964) at p. 299 the Court held that the charge " . . . of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of Section 16 (First)." The Court was referring to charging shippers disguised markups and was validating a rule which prevented a practice that was alleged to violate Sec. 16 unless prevented by rule. The Court distinguished the cases involving "transpor-

tation [54] or wharfage charges . . . dependent on the particular comodity involved . . . " where the fees for shipping bananas would bear no relation to the fees levied for heavy industrial equipment, and where proof of a violation would require a showing of competitive relationship. The Court continued by stating the fact that the widely varying amounts covered substantially identical services and " . . . seems to us to be prima facie discriminatory in a regulated industry." (Id.) This statement means the action itself violates the law without proof of a competitive relation to anyone else. The present facts do not concern a comparison of services and related versus unrelated charges for the services, but concern a cost of doing business in the form of an assessment which is like a tax. Nevertheless, a requirement of a competitive relationship is excludable as a prerequisite to proof of a violation because the measure of respondents' charges is equally unrelated by apparent reason to what the charge is for, just as widely varying charges are unrelated to services that are substantially the same. The statements of the Court about the sufficiency of variations unsupported by reasons and lack of need for competition as proof to establish violation of Sec. 16 (First) are thus pertinent and applicable. A finding of undue prejudice or disadvange under Sec. 16 should not be made to depend on competition, but may exist in relation to other kinds of property where it is shown they should be treated alike, absent contrary reasons. The existence of competitive shippers may affect the amount of reparation due, but not liability under Sec. 16.

[55] Finding No. 6 is supported.

Sec. 17 of the Act requires every other person to observe just and reasonable regulations and practices relating to the receiving, handling, storing and delivering of property. Sec. 17 singles out certain acts of discrimination against property and authorizes the Commission to prescribe just and reasonable practices. Sec. 17 concerns practices in

connection with property, no matter how it is transported, whether by common carrier or otherwise.

Respondents have established, observed, and enforced, relative to the receiving, handling, storing, or delivering of property, in the discharge of obligations as a PMA member, the following regulations and practices:

a. adoption of a method of measuring such property to obtain money to meet payments to the Fund;

b. acceptance of the obligation to make, and making, monthly payments to PMA in accordance with the agreed measure; and,

c. inclusion in their charges for terminal facilities of the amount due by application of the agreed measure.

It has been held that practices which result in the assessment of charges against persons not directly benefited by services rendered are an unjust and unreasonable practice within the meaning of Sec. 17. *Terminal Rate Structure—Pacific Northwest Ports,* 5 FMB 53 at 55 (1956). In that proceeding only book entries were involved. A cost allocation accomplished by actual charges against persons not directly benefited, as [56] where automobiles have lower handling charges than other cargo and receive less benefit than other general cargo on the average from the arrangement with ILWU, is equally if not more a "practice" than book entries. Our predecessor stated in the *Terminal Rate Structure* case (supra) at p. 56, "the terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation". Respondents have followed PMA directives by imposing charges resulting from the automobile measure to make up for deficiencies in assessments and contributions to the Fund resulting from lower assessments on coastwise trade, lumber, certain Army property, and to some extent the lower assessment

on all other property. Complainant's property is made responsible for bearing 10 times higher charges than other property and 20 times higher than that in the coastwise trade. The difference in treatment between Complainant and all others resulting in this expensive result is also an unjust regulation.

The Respondents' practice may not be looked at only in relation to one item of property, i.e., automobiles, but must be viewed as part of the complex of practices of which it is a part and comparisons and evaluations made as to the reasonableness of the entire system of cost measurement and allocation. The majority avoids this task of passing on reasonableness of the measure on the ground that (a) "there is no statutory requirement" of equality and (b) "it was necessary in the business judgment of respondents." Neither is there any statutory requirement of inequality and *Evans Cooperage Co.*, [57] *Inc.* v. *Board of Commissioners*, 6 FMC 415 (1961), does not hold that charges may be differentiated without reason so as to burden one person or class of property 10 times more than others where "the record contains no basis upon which a reasonable allocation of costs could be made". In the *Evans* case, on the contrary, the charge to complainant was exactly the same as to everyone else, and it was only found the benefits, while somewhat different, could not be measured precisely. The facts were that the ship charged dockage did not tie up to the dock, but to the seaward side of a ship already tied up. The "business judgment" argument only means the measure is reasonable because Respondents say so. This is an excuse, not a reason.

Finally, the fact that the decision was a business judgment unrestrained by normal forces of supply and demand introduces potential unjustness in the regulation by its unrestrained character. Here business judgment is not being exercised subject to competitive market restraints of other suppliers, but is being exercised by substantially all sup-

pliers to regulate the market itself. Judgment is restrained by the vote of PMA members who are virtually the entire market for the handling of property passing through Pacific Coast ports. The articles of association obligate obedience to the voted decision. There is no other practical restraint, particularly in view of evidence that ILWU was putting pressure on non-PMA members to contribute the same as members. Normally the function of regulating the market itself when needed in the public interest is reserved to government, [58] rather than to a private association or to the association aided by the dominant labor union association.

If the assessment charges varied in response to competitive forces within the market, a business judgment decision might not be unjust because of the protective restraint afforded by the open market. Where the market protection is missing, however, there is no assurance of justness, and it is the function of government to provide the assurance. The facts of this case provide a perfect example of what happens when there is a single decision rather than an interplay of conflicting decision by many entrepreneurs. The tenfold charge would probably be impossible under competitive conditions. PMA was able to single out various subjects of commerce and, aided by labor unions, to make property subject to assessment to meet labor costs in the same way that the government measures property for tax purposes to meet costs of government. There was no practical restraint on its choice. The unrestrained choice of a measure unrelated to labor costs needs justification to begin with, but is made unjust by the unequal application made possible by Respondents' participation in the PMA control over the market.

The majority refers to the reasonableness of Respondents' activities attested by (1) efforts to change the Mechanization Fund assessments, (2) offers to pass on only part of the assessments, and (3) measurement levies on dues for

several years without protest. Presumably the statement refers to the second paragraph of Sec. 17, requiring other persons subject [59] to the Act to establish "reasonable regulations and practices", and to activities equated with regulations and practices. There is no question in this dissent as to Respondents' good intentions in seeking a change in the assessment and offering to pass on only part of the assessment. What have been questioned and found wanting are the actual results of Respondents' practices in line with the agreed regulations. The facts show the assessments have not changed, nor have claims against VW for full payment actually been changed. At most the offer to pass on only part of the assessment was a bargaining concession, not a change of conduct: With regard to several years of levy without protest of the PMA dues assessment as distinguished from the Mechanization Fund assessment on a measurement basis, past failure to challenge the practice relative to dues may not be translated into present and future reasonableness of the disparate practices relative to the Mechanization Fund. The past in this case must relate to before November 1961, because around that time VW representatives made known their objections to what was being done to them in regard to the Fund Assessments. (Tr., 151-155) If Respondents make the intended changes, another issue might be presented.

Finding No. 7 is supported.

4. *Observations.* The many complex considerations in this proceeding ultimately funnel themselves down to the single error of PMA in choosing property rather than labor (in terms of man-hours with adjustments to meet disclosed [60] inequities) as a measure. PMA chose the wrong measure for its members' obligation to compensate the working man for displacement from mechanization improvements creating fewer opportunities for work. Praise-

worthy as these endeavors are, PMA lost sight of the basic consideration that Secs. 16 and 17 of the Act are founded on a policy of protecting property in commerce and protecting its competing owners and the public against unfair competitive practices. Such policy includes protection of the public against unfair market control. Had PMA chosen to follow its minority committee report and avoided the use of the protected property to measure its charges on shippers and on commerce and used instead a labor measure, and property to a less extent, equitably applied, my conclusions about these acts would very likely be the reverse of what they are. With such a measure, any burden would be directly related to and attributable to labor costs and become a just cost of business. Different assessments would be based on genuinely different situations. No description of traffic and no particular person would be singled out as the object of disadvantage. The entrepreneurs' expenses would be related to the working man's production. The measure would be related to compensation for displaced production, would not be subject to unfair market control, and would be just, fair, reasonable, and without prejudice or disadvantage.

Conclusion

For the foregoing reasons the Examiner should be reversed in deciding there has been no violation of Secs. 15 or 16 and no failure to comply with Sec. 17 of the Act, and the exceptions should be sustained.

[61] **Commissioner Hearn, Dissenting**

Like the majority, I conclude that the record does not establish violations of sections 16 and 17 of the Act. Complainant's automobiles have not been disadvantaged or prejudiced to the preference or advantage of any other automobile shipper, and the assessment of complainant's

automobiles on a measurement rather than a unit or weight basis, has not been shown to constitute an unreasonable practice relating to the receiving, handling, storing, or delivering of property. Further, although it is asserted that automobiles shall derive only a general or common benefit from the fruition of the PMA-ILWU compacts, there need "be no precise equivalence between the services rendered and the charges." *Evans Cooperage Co. Inc.* v. *Board of Commissioners,* 6 FMB 415, 419 (1961).

I disagree with the majority solely on the reading of the record in the light of section 15. As a general rule, our long established national policy frowns upon concerted action by members of all segments of our business community. Ocean shipping, forwarding, and terminal operating subject to our jurisdiction have traditionally enjoyed an exemption from this rule where the concerted action is not contrary to our public interest or detrimental to our commerce,[1] and is pre-approved by the Commission. Absent the foregoing, such conduct is contrary to section 15 and is unlawful under the Shipping Act.

As exceptions to our national antitrust policy, proposed agreements must be scrutinized carefully:

> The condition upon which such authority [the authority to legalize concerted action] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than necessary to serve the purposes of the regulatory statute. *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 57 (D. C. Cir. 1954).

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[1] "[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws." *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 57 (D. C. Cir. 1954).

Report of the Commission

[62] It is in this context that the following language of section 15 is so important:[2]

> Any agreement . . . not approved . . . by the Commission shall be unlawful, and agreements . . . shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, . . . any such agreement. . . .

Thus, the sole issue to which I address myself is whether respondents, persons subject to the Act, entered into and carried out an agreement, understanding, or arrangement within the purview of section 15 with other members of PMA, many of whom are admittedly common carriers by water or other persons subject to the Act.[3] It is my conviction that the members of PMA entered into and carried out a "co-operative working arrangement" which, as I have noted, required this Commission's approval as a prerequisite to its effectuation under the explicit language of the statute.

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[2] Unlike the Examiner, I find nothing in section 15 "inane." Nor did the Commission in *Unapproved Sect. 15 Agreements—S. African Trade*, 7 FMC 159 (1962) at page 190, find the phrase "inane" or superfluous:

> "Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or 'if oral' a true and complete memorandum, of 'every agreement' covering any of the wide range of anticompetitive activities therein mentioned, 'or in any manner providing for an exclusive, preferential, or cooperative working arrangement.'"

[3] The agreement or agreements between PMA and ILWU are clearly labor-management agreements and consequently are not within the reach of the Act. While these agreements may have triggered the arrangement by the membership of PMA, the PMA-ILWU compacts are irrelevant to the central issue here.

Report of the Commission

I agree with the majority's statement that the legislative history of the Act makes it clear that section 15 was intended to apply only to those cooperative working arrangements "which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping . . . public . . .". (p. 6), but I read this record as definitely affecting (1) the shippers of automobiles rate-wise, and (2) the competition [63] among PMA members themselves with respect to the discharge rates that they may offer automobile shippers. While "agreements . . . to pool secretarial workers or share office space" may be co-operative working arrangements not within the scope of section 15 as the majority says at page 7, certainly a working agreement to raise 29 million dollars over a five and one-half year period, through detailed and uniform assessments relating to cargo handled, is a different situation and is hardly akin to a secretary pool in my opinion. Furthermore, it is different not only in size but, more importantly, in character.

The record illustrates that PMA knew the assessment had to be passed on to the cargo, at least to automobiles.[4] A telegram from Brady-Hamilton, one of the PMA members who handled Volkswagens states:

> The position of the Committee, that the assessment on unboxed auto is the responsibility of the stevedore to pay, appeared to attempt to release [PMA] from any responsibility, to the extent that the stevedore could be entirely free to absorb all of the assessments if he desired. The cost of this assess-

[4] PMA also knew that assessments against Army cargo were passed on. PMA's records show that lest Volkswagen get relief, the Army would be next in line; ". . . they are still querulous about the propriety of such contributions.". (Ex. 22).

> ment is so much greater as compared to the stevedoring cost it could never be considered. . . . (Ex. 24).

Marine Terminals, as well, advised PMA on November 29, 1961, (Ex. 25): "There is no way that the contractor could absorb such an increase . . ." and an inter-office PMA memo of December 13, 1961, (Ex. 27) states:

> The Committee at present feels that the tonnage formula does not work an inordinate hardship *on the shipper*. . . . (Emphasis added).

In a letter dated March 1, 1961, Marine Terminals advised PMA of its difficulties in collecting contributions to the Mech Fund assessed against Volkswagens:

> We have informed them that we at Marine Terminals are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and *therefore are considered only a collection agency in this matter.*
>
> We find ourselves in a very awkward position and wish to be advised of the *committee's decisions on how automobiles will be assessed* and what stand we can take in demanding payment of this assessment. (Ex. 9) (Emphasis added).

[64] The "collection agency" designation becomes more than a unilateral misconception on Marine Terminals' part when PMA's minutes of December 13, 1961, (Ex. 2H) are examined:

> Chairman read a communication from the Funding Committee covering the problem of collecting funds *from Volkswagen* due the Mechanization Fund . . . Marine Terminals requested that a letter covering

this discussion be forwarded to them and that they be *authorized* to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel. (Emphasis added).

Again, PMA's minutes of March 14, 1963, (Ex. 2C) show:

On the matter of mechanization assessments Counsel recommended an escrow account for payments by the stevedores *on behalf of Volkswagenwerk.* The Board of Directors this morning took no action to modify its previous position that the contributions be paid currently. (Emphasis added).

In my view, these exhibits[5] reveal a co-operative working arrangement by members of PMA relating to the fixing or regulating of transportation rates, at least so far as automobiles and possibly Army cargo are concerned. It is of no moment that a formal, legally binding contract to assess certain tolls upon cargo has not been produced. "Section 15 is not concerned with formality but with the actual effect of the arrangement." *Unapproved Sect. 15 Agreements—S. African Trade, supra* at 188. The failure of respondents and PMA to get prior approval for the plan from the Commission renders the effectuation of it unlawful. As stated in *Status of Carloaders and Unloaders,* 2 USMC, 761 (1946) at page 766:

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[5] The exhibits are contemporaneous records and as such are far more persuasive than the after-the-fact, self-serving statements of PMA witnesses to the contrary.

> When carriers or "other persons" undertake, by agreement, to *fix* or *regulate* rates, . . . there must be performed a series of acts under the statute. (1) They must file the agreement with the Commission.

Due to the posture of the record and the narrow question under section 15 presented here, I do not reach the issue of approvability, under section 15, of PMA's plan in furtherance of the laudable social ends envisioned by its arrangements with ILWU. However, approvable or not, the parties are not relieved of their obligation to secure the approval of the Commission before they attempt to carry it out.

[65] In conclusion, I believe the majority seriously erred in not finding that the respondents, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) violated section 15 by being parties to, and carrying out, a co-operative working arrangement with other members of intervener PMA without the prior approval of this agency.

By the Commission.

/s/ Thomas Lisi
THOMAS LISI
Secretary

(SEAL)

Order of Commission

(Filed October 13, 1965)

Served
October 13, 1965
Federal Maritime Commission

[1] FEDERAL MARITIME COMMISSION

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, *et al.*

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is incorporated herein by reference, THEREFORE,

IT IS ORDERED, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

/s/ Thomas Lisi
THOMAS LISI
Secretary

(SEAL)

Petition for Review

(Filed December 10, 1965)

[1] In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19840

Volkswagenwerk Aktiengesellschaft,
Petitioner,

v.

Federal Maritime Commission and
United States of America,
Respondents.

Petition For Review of an Order of
The Federal Maritime Commission

To the Honorable Judges of the United States Court of Appeals for the District of Columbia Circuit:

Volkswagenwerk Aktiengesellschaft ("petitioner" or "VW") hereby petitions this Court to review and set aside an Order of the Federal Maritime Commission dismissing a complaint filed by it with that agency alleging violations of the Shipping Act, 1916, in connection with the discharge of vehicles exported by it to this country.

Copies of the Order and of the report of the Federal Maritime Commission incorporated in such Order by reference are attached to the copies of this petition filed with this Court.

Petition for Review

[2] NATURE OF PROCEEDINGS

1. This proceeding involves the lawfulness, under the Shipping Act of 1916, as amended (39 Stat. 728, 46 U. S. C., Section 801 *et seq.*), of certain charges for the use of terminal services and facilities, including stevedoring, in connection with the discharge of automobile cargoes at San Francisco and Los Angeles.

2. Petitioner is a shipper of Volkswagen vehicles to the United States West coast. Approximately one-fourth of its Volkswagen vehicle cargoes entering the United States through the Pacific coast ports is carried by common carrier. The balance is transported on vessels chartered by VW. In 1961 and 1962 approximately 40,000 Volkswagen vehicles were discharged annually at these ports.

3. In its complaint before the Federal Maritime Commission ("Commission"), VW named as respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), hereinafter collectively referred to as "MTC". These companies are employed by VW to discharge at the ports of San Francisco and Los Angeles the automobiles sent there by VW by chartered vessels. They perform similar services for common carriers by water with respect to automobile cargoes, including those of VW.

[3] 4. The charges which form the subject matter of VW's complaint to the Commission arise out of arrangements entered into by MTC as members of the Pacific Maritime Association ("PMA"). PMA made itself a party to the proceeding by intervening.

5. PMA is an organization formed by common carriers serving the Pacific coast and companies engaged in furnishing stevedoring and terminal services and facilities at ports along this coast. It deals collectively with labor problems of its members. The by-laws of PMA ensure that ship operators, and more specifically liners, control its affairs. VW is not a member of PMA.

6. In 1960-61, PMA entered into collective bargaining agreements with the International Longshoremen's and Warehousemen's Union in which, in exchange for more efficient operations on the waterfront, it undertook on behalf of its membership to pay twenty-seven and one-half million dollars over a period of five and one-half years into a Mechanization and Modernization Fund ("Mech Fund") for the benefit of longshoremen, marine clerks and similar employees. These agreements exclude the union from any voice in the method by which this sum is to be raised. PMA reserved for itself alone the power to decide from whom, and how, this money is to be collected. [4] It is PMA's exercise of this reserved power that gives rise to the present proceeding, not its collective bargaining agreements which VW recognizes as a most praiseworthy achievement in labor relations.

7. By agreement of the membership of PMA the monies required for the Mech Fund are to be raised by a system of assessments against every ton of cargo loaded or discharged by the members. For all commodities, except automobiles, the ship's manifest determines how such tonnage is to be measured, that is, whether by measurement or by weight. The tonnage thus shown on the manifest is then multiplied by an amount fixed by PMA for that type of cargo to arrive at the amount to be paid PMA for purposes of the Mech Fund. Roughly speaking, each ton of bulk cargo pays 5-½ cents a ton, and each ton of general cargo, during the period of the proceedings below, paid 27-½ cents and thereafter,

28-½ cents a ton. Automobiles, however, are an exception and they are assessed by measurement rather than by weight, regardless of how they are manifested. By measurement, the Volkswagen vehicles of petitioner have a tonnage approximately ten times as great as they do by weight. In manifesting automobiles, sometimes one measure and sometimes the other is employed. By requiring the tonnage of automobiles [5] to be reported by measurement rather than by weight, regardless how manifested, PMA ensured that the highest possible assessment would be levied on every automobile discharged on the Pacific coast. Under this assessment formula, the cost of discharge of automobiles is increased about ten times as much as is the average cost of discharge of other general cargo, 26 percent as against 2.2 percent. Direct labor costs are affected in the same proportion.

8. No benefits from the Mech Fund are expected to accrue to automobiles in proportion to the burdens imposed. Stevedoring of cars has always been an efficient and economical operation. Auto shippers will, however, receive some general benefits such as freedom from strikes or slowdown, from the Fund plan.

9. The agreements, understandings and arrangements among the members of PMA, pursuant to which charges for the Mech Fund have been assessed have never been submitted to the Federal Maritime Commission for its approval as cooperative working arrangements among carriers and other persons subject to the Shipping Act of 1916 in accordance with section 15 of that Act (39 Stat. 733, 46 U. S. C., section 814). The Commission has not given its approval to these arrangements pursuant to section 15 of that Act.

[6] 10. MTC has attempted to pass on to petitioner the charges for the Mech Fund assessed by PMA for the ve-

hicles shipped by petitioner through the port facilities of MTC.

11. Petitioner has declined to pay the special charges for the Mech Fund on the grounds that the charges could not lawfully be made without prior approval of the aforesaid cooperative working arrangements under section 15 of the Shipping Act of 1916; that the charges are in violation of sections 16 and 17 of the Shipping Act of 1916 (39 Stat. 734, 46 U. S. C., sections 815 and 816) by singling out petitioner's automobiles for excessive charges.

12. VW applied without success to PMA for modification of its inequitable and unfair formula. Any change in the formula reducing the assessment on automobiles would not be in the self interest of the majority of members of PMA since, in order to raise the lump sum needed for the Mech Fund, such reduction would have to be balanced by an increase in the amount paid on cargo carried by the shipping lines which dominate PMA.

13. Before the Mech Fund, VW paid approximately $10.45 per vehicle for stevedore and terminal handling. The margin of profit to the stevedore or terminal operator [7] was one dollar or less. Since the PMA assessment for the Mech Fund averages $2.35 per vehicle, it cannot be absorbed by the stevedore or terminal operator out of profit.

14. As a consequence of petitioner's refusal to pay the charges for the Mech Fund, MTC made no payments to PMA on the discharge of Volkswagen vehicles arriving by chartered vessels. However, payments have been made into the Mech Fund by MTC and other stevedores and terminal operators on all Volkswagen automobiles arriving at the Pacific coast by common carrier, with some minor exceptions.

15. PMA has filed a libel against MTC and others in the United States District Court for the Northern District of California, Southern Division, for recovery of the assessments on the discharge of Volkswagen vehicles arriving by chartered vessel. MTC joined petitioner as a party by interpleader. Upon request of petitioner, the District Court stayed the proceedings pending decision by the Federal Maritime Commission of the questions raised by petitioner's objections to the charges. Thereafter, petitioner filed the complaint with the Federal Maritime Commission in which the order was entered, which is made the subject of this review. The complaint charged violations of sections 15, 16 and 17 of the Shipping Act.

[8] 16. Section 15 of the Shipping Act of 1916 provides, in part:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing, or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

An agreement within section 15 requires approval by the Commission before it can be carried out lawfully. Petitioner alleged in its complaint to the Federal Maritime Com-

mission that MTC was a party to an agreement covered by this section and that since this agreement had never been filed nor approved by the Commission, it could not legally be executed and carried out by MTC.

17. Petitioner further contended that the agreement could not be approved by the Commission after it was filed because it is unjustly discriminatory and unfair as between shippers and importers, operates to the detriment of the commerce of the United States, is contrary to the public interest and is in violation of sections [9] 16 and 17 of the Shipping Act, 1916, in that it imposes upon automobile cargoes a disproportionately high share of the costs of the Mech Fund.

18. PMA's formula and the assessments made thereunder were attacked as subjecting petitioner and automobile cargoes to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act. Furthermore, MTC was alleged to be engaged in an unjust and unreasonable practice related to and connected with receiving, handling, storing and delivering of property in violation of section 17.

19. Hearings were held and evidence taken by a Hearing Examiner on the complaint. In an initial decision rendered on June 4, 1964, setting forth findings of fact and conclusions, the Examiner found no violations of sections 15, 16 or 17. Although he found that there existed a "cooperative working arrangement" among "persons subject" to the Act, he held that such cooperative working arrangement was not within the purview of section 15 because, in his view, it did not pertain to ocean transportation and was not in the same general class as those specifically enumerated by that section.

20. The Examiner found no violation of section [10] 16 because there was no discrimination as between Volkswagen automobiles and other automobiles and there is no other cargo classification in competition with automobiles. He likewise exonerated MTC of any violation of section 17 on the ground that MTC was justified in passing on "an operating expense applicable to the discharge of automobiles."

21. Petitioner filed exceptions to the conclusions, findings and statements in the initial decision and a brief in support to which replies were filed. Oral argument thereon was heard by the Commission.

22. Thereafter, the Commission issued its Order dismissing the complaint. Incorporated in this Order, by reference, is the Commission's report stating its conclusions and decision. Two Commissioners dissent. The report does not adequately state whether the Commission adopts or rejects the findings of the Examiner, or whether it accepts or rejects petitioner's exceptions to such findings.

23. The Commission found nothing "in the agreements of record in this proceeding which brings them within the purview of section 15." That section it held, applied "only to those agreements involving practices which affect that competition which in the absence of the [11] agreement would exist between the parties when dealing with the shipping or travelling public or their representatives." In the view of the Commission, the agreement among the membership of the PMA regarding the amount to be paid into the Mech Fund on each ton of cargo loaded or discharged did not satisfy these requirements.

24. For this agreement to be embraced within section 15, the Commission held there would have to exist "an addi-

tional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators." It found the record "devoid of evidence showing the existence of such an additional agreement."

25. The Commission sustained the Examiner in finding no violation by MTC of sections 16 or 17.

26. Commissioner Patterson dissented from all the Commission's conclusions. He found that MTC had violated sections 15, 16 and 17 of the Act. Commissioner Hearn concurred with the majority in finding no violations of sections 16 and 17 but held that MTC had violated section 15 by being parties to, and carrying out, a cooperative working arrangement with the other members [12] of PMA without the prior approval of such arrangement by the Commission. However, he did not reach "the issue of approvability," under that section of PMA's plan.

JURISDICTION AND VENUE

27. The jurisdiction of the Court is invoked under section 31 of the Shipping Act of 1916, as amended, 39 Stat. 738, 46 U. S. C., section 830, sections 2 and 9 of the Judicial Review Act, as amended, 64 Stat. 1129 and 64 Stat. 1131, 5 U. S. C., sections 1032 and 1039 and section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C., section 1009.

28. VW is adversely affected and aggrieved by the Order of the Commission sought to be set aside dismissing its complaint and terminating the proceeding in that it is a shipper on common carriers which are paying the assess-

ments levied under the arrangement under attack, it is a charterer and employer of stevedoring contractors and terminal operators which are parties to that arrangement and which are engaged in the acts and practices and imposing the charges challenged in the Commission proceeding and it is the complainant in such proceeding.

29. Section 2 of the Judicial Review Act, 5 U. S. C., [13] section 1032, authorizes the filing of petitions for review of orders of the Federal Maritime Commission in Courts of Appeals of the United States. Section 3 of that Act, 5 U. S. C., section 1033, permits the filing of the petition in the United States Court of Appeals for the District of Columbia Circuit. Thus, venue is proper.

GROUNDS ON WHICH RELIEF IS SOUGHT

30. In issuing the Order of which review is sought, the Commission disregarded and violated its obligations under the Shipping Act of 1916 and the Administrative Procedure Act.

31. The Shipping Act of 1916 governs the conduct of common carriers by water and of any other persons carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water. The Act uses the term "other person[s]" to cover the latter group. MTC are "other person [s]" within the meaning of the Act. All, or substantially all the other members of PMA are likewise covered by the Shipping Act, either as "other person[s]" or as common carriers by water.

[14] 32. The Commission erred in finding that the cooperative working arrangement among MTC and the other members of PMA regarding collection of the Mech Fund is not subject to section 15 of the Shipping Act of 1916. Section 15 of the Shipping Act embraces all concerted action by common carriers and related persons affecting the entire spectrum of services connected with marine transportation. The only interpretation of section 15 which is consistent with its legislative history and with its past administrative construction is that whenever persons subject to the Shipping Act engage in concerted action, they bring themselves within the reach of that section. The cooperative working arrangement among the membership of PMA affected the loading and discharge of ocean cargo and was subject to section 15.

33. The Commission erroneously concluded that section 15 of the Shipping Act embraces only agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives.

34. Even under the standard adopted by the Commission it erred in failing to find that an agreement among stevedores and terminal operators to impose an [15] artificial and unwarranted charge upon the discharge of every automobile unloaded by them is not an interference with competition.

35. In view of the obligation of the Commission to investigate complaints filed with it setting forth violations of the Act, the Commission erred in dismissing petitioner's complaint because it viewed the record as devoid of evi-

dence of the existence of an agreement by the PMA membership to pass on all, or a portion of, its assessments to the carriers and shippers served by the terminal operators. If the Commission deemed the existence of such an agreement critical to the issue of a violation of the Act, it was under an obligation to investigate further.

36. The Commission erred in holding in effect that an explicit agreement to pass on the PMA assessment was necessary to invalidate the cooperative working arrangement among the membership of PMA since irrespective of whether such an explicit agreement existed or not, such arrangement in operation, due to economic necessity, was the exact equivalent of, and had the same economic effect, as an explicit agreement and such result was intended and anticipated by PMA membership in adopting such arrangement.

[16] 37. The Commission erred in finding no violation of section 16 of the Act by MTC. The fact that petitioner's automobiles have not been subjected to prejudice or disadvantage as compared to other automobiles is not decisive. Petitioner's automobiles have been discriminated against in comparison with other traffic by MTC in execution of the PMA agreement. Whereas all other traffic is assessed in accordance with the way it is manifested, petitioner's automobiles are assessed on the basis of measurement tonnage, regardless how manifested. Furthermore, a burden disproportionate to any benefit received has been imposed upon petitioner's automobiles in comparison with other traffic.

38. The Commission erred in finding no violation of section 17 of the Shipping Act of 1916. Section 17 requires every common carrier by water in foreign commerce and

every other person subject to the Act to "establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property." MTC is a person subject to the Act. MTC, by reason of its membership in PMA, violated section 17 in:

(a) adopting an unfair and unjust method of allocating to property received, handled, stored and [17] delivered by it a common cost, i.e., the Mech Fund;

(b) accepting the obligation to make, and making, regular monthly payments to PMA in accordance with such allocation; and

(c) including in their stevedoring rate the amount allocated pursuant to the method adopted.

39. The Commission erred in disregarding and failing to rule on petitioner's contention that entry by MTC into the agreement with PMA regarding the allocation of the cost of the Mech Fund and their execution of such agreement were unreasonable practices under section 17.

40. The Commission erred in interpreting section 17 as permitting users of the same facility to be charged amounts not directly related to the benefits derived therefrom so long as each one receives some "substantial benefits."

41. The Commission erred in interpreting section 17 as applicable to the charges imposed upon petitioner only in the event that it could be shown that they were imposed because of a design deliberately to burden petitioner more than other users of stevedores and terminal facilities with the cost of the Mech Fund. But [18] even if this inter-

pretation had been correct, the Commission erred in failing to find such a design present here.

42. The Commission violated its obligations under section 8 of the Administrative Procedure Act (5 U. S. C., section 1007) in failing to make findings upon the material issues of fact and law presented; in failing to rule adequately on petitioner's exceptions to the decision of the Hearing Examiner; and in failing to state conclusions which have a rational basis in law or fact in support of its rulings.

43. The Commission's Order, of which review is sought, is based upon statements which are unsupported by substantial evidence, is arbitrary and capricious and is not in accordance with law.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays:

(1) That copies of this petition be served upon the respondent agency and upon the Attorney General of the United States in accordance with section 4 of the Judicial Review Act, 5 U. S. C., section 1034;

[19] (2) That a transcript of the record upon which the Order in question was entered be certified and filed in this Court in accordance with section 6 of the Judicial Review Act, as amended, 5 U. S. C., section 1036 and with 28 U. S. C., section 2112;

(3) That this Court review the Order of the Federal Maritime Commission dismissing petitioner's complaint;

(4) That upon review, this Court set aside said Order;

(5) That this Court find that the Commission's Order is contrary to law and in derogation of the Shipping Act, 1916, and of the Administrative Procedure Act;

(a) That this Court find that MTC has violated sections 15, 16 and 17 of the Shipping Act of 1916; and

(6) That petitioner have such other and further relief as may to the Court seem just and proper.

[20] Respectfully submitted,

/s/ Richard A. Whiting
/s/ Robert J. Corber

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Stipulation as to Issues and Proceedures to be Followed

(Filed March 8, 1966)

[1] IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19840

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors

Subject to the approval of the Court, it is hereby stipulated and agreed between the parties, through their respective counsel, that the issues and the subsequent procedures to be followed herein shall be:

I

ISSUES

1. In the view of petitioner the following issue is presented:

Stipulation as to Issues and Procedures to be Followed

[2] Whether Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (hereinafter collectively referred to as "MTC") are "carrying on the business * * * of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water" so as to be subject to the Shipping Act of 1916, as amended, as "other person[s]."

2. Petitioner, Respondents and Intervenor Pacific Maritime Association (hereinafter "PMA") agree that the following issue is presented:

Did the Commission err in determining that no agreement subject to Section 15 existed between MTC and other members of PMA with respect to the assessments referred to on pages 2 and 3 of the Commission report?

MTC would state the above issue as follows:

Did the record permit the Commission to find and conclude in the proper exercise of its discretion, that, assuming MTC to be a person subject to the Act, no additional agreement subject to Section 15 existed between it and other members of PMA or that no violation of Section 15 had been shown?

[3] 3. Petitioner and Respondents agree that the following issue is presented:

Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the prohibitions of Section 16 First against making or giving undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or against subjecting any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever?

Stipulation as to Issues and Procedures to be Followed

It is the position of Petitioner that this issue should properly be phrased so as to refer to conduct of MTC in conjunction with others as well as by themselves.

> PMA and MTC would state this issue as follows:
>
> Did the record permit the Commission to find and conclude, in the proper exercise of its discretion, that MTC, assuming it to be a person subject to the Act, did not, by including in its charges to Petitioner its full labor costs, violate the prohibitions of Section 16 against making [4] or giving undue or unreasonable preference to any person or description of traffic or against subjecting any person or description of traffic to undue or unreasonable prejudice or disadvantage?

4. Petitioner and Respondents agree that the following issue is presented:

Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the provisions of Section 17 requiring the establishment, observance and enforcement of just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property?

It is the position of Petitioner that this issue should properly be phrased so as to refer to conduct of MTC in conjunction with others as well as by themselves.

> PMA and MTC would state this issue as follows:
>
> Did the record permit the Commission to find and conclude, in the proper exercise of its discretion, that MTC, assuming it to be a person subject to the Act, did not, by including in its charges to Petitioner its full labor costs, violate the [5] prohibitions of

Section 17 against unreasonable practices relating to the handling of property?

5. All parties agree that the following issue is presented:

Whether the Federal Maritime Commission in Docket No. 1089 complied with the provisions of Section 8 of the Administrative Procedure Act (5 U. S. C. Section 1007)? In particular, did the Commission make findings upon each of the material issues of law and fact presented and did it rule adequately on Petitioner's exceptions to the decision of the Hearing Examiner?

6. All parties agree that the following issue is presented:

Whether the conclusions of the Commission in the order dismissing Petitioner's complaint support its order and are, in turn, supported by adequate findings, substantial evidence in the record and rational bases in the law?

II

Procedures With Respect to Printing of the Joint Appendix and Use of Unprinted Portions of the Record

In preparing and printing briefs, record [6] references shall be to the pages of the documents before the agency as certified to the Court. The joint appendix shall be printed with the page numbers of these documents as certified in this Court appearing at the place where each new document page begins on the printed page of the joint appendix, and running heads showing the document pages appearing thereon shall be printed at outer top corners of each page of the printed joint appendix. The usual numerical pagina-

tion of the printed joint appendix will appear in the center of the top of the page.

Parties may serve briefs in typewritten or mimeographed form or printer's proofs, provided that printed copies of such briefs shall thereafter be filed with the Court and served upon opposing parties within ten days after the due date of the reply brief. In all instances, at least three copies of each brief shall be served on counsel for each opposing party.

Designation of the portions of the certified record to be reproduced in the joint appendix shall be made within five days after the briefs of Respondents and Intervenors are filed.

Within ten days after the due date of the reply brief, the Petitioners shall cause the joint appendix to be printed and filed with the Court and served upon the Respondents.

[7] Any party and the Court, at and following the hearing in this case, may refer to any portion of the original transcript of record herein which does not appear in the joint appendix to the same extent and effect as though such portions of the transcript had appeared in such appendix.

.....

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.....

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[fol. 92]

BEFORE THE FEDERAL MARITIME COMMISSION

Docket No. 1089

In the Matter of:

VOLKSWAGENWERK AKTIENGESELLSCHAFT,

v.

MARINE TERMINALS CORPORATION, et al.

EXCERPTS FROM TESTIMONY

* * * * * * *

[fol. 121]

PETER N. TEIGE for Complainant, Direct (continued).

By Mr. Madden:

Q. Now, going back to your so-called new fund committee in the material handed me yesterday, pursuant to the subpoena, I have some rough notes handed me entitled, "First meeting, New Fund Committee," dated 2/14/61.

Mr. Ransom: Off the record.

Examiner Theeman: Off the record.

(Discussion off the record.)

Examiner Theeman: On the record.

By Mr. Madden:

Q. Do you know who made those notes?

A. I believe they were made by Mr. Lancaster, but I am not positive of that. Mr. Lancaster was a member of the staff of Pacific Maritime Association who attended

most of these meetings and acted as sort of a secretary, and staff back-up man, for the committee.

Q. Do you recall what was discussed at that first meeting where, at the bottom of the first page and the top of the second one, it says, "Non-member assessments," and "autos-manifest"?

A. Well, those are two separate subjects, as you see. This lists a sum of items that were discussed at the meetings.

Q. Yes.

A. And the first one you mentioned, non-member assess-
[fol. 122] ments, would I believe have been a discussion about concern expressed by some members of the committee that the assessment made by the ILWU against uses of ILWU labor on the Pacific Coast who were not members of PMA might conflict with hours that we were assessing against members, and there was I believe a general discussion of that problem.

I don't recall any action being taken, but more just expressions of concern.

The other subject at the top of the second page of the exhibit refers to the subject that we are discussing here today, namely, the appropriate formula to be applied for the collection of contributions to the fund on unboxed autos, and I assume it was raised by the letter of January 17, 1961, from Winchester Agencies, and the letter from Hanseatic Vaasa.

Q. There is a question after that, "Autos-Manifest." Was there some question raised at that meeting on whether vehicles should be assessed as manifested?

A. I don't recall that. My recollection, such as it is, is that the suggestions or discussions on this subject were about the fairness of applying the PMA tonnage formula to autos.

Q. Now, I note just below that there is a remark, "Recommend empty containers on weight and contents as manifested."

[fol. 123] Q. A general discussion?

A. A general discussion. It was not a discussion about anybody being in restraint of trade but, rather, making [fol. 124] the group aware of that problem.

* * * * * * *

[fol. 140] Cross examination.

By Mr. Ransom:

Q. Mr. Teige, on that committee of yours, there was American President Lines represented, Pacific Far East [fol. 141] Lines, and States Lines. Do any of those who are carriers also perform terminal activities?

A. American President Lines does perform terminal services, both for itself and in a few instances for others. It is my understanding that the same is true of Pacific Far East Line and States Steamship Company.

In any event, I do know that they perform their own terminal services for their own operations.

Q. And the terminal's 15 cents per manhour would be paid by them as the terminal company?

A. Yes, they would pay it as the direct employer of the terminal services employees.

Q. The change relating to adding clerks, did that have anything whatever to do with the Volkswagen situation?

A. No, it did not.

Q. You have frequently in your testimony, Mr. Teige, used the expression, "Automobiles are a measurement cargo."

Would you explain what you mean by that?

A. Well, I mean by that that in freighting them or charging freight rates for the carriage of automobiles in a berth trade, that since there are more measurement tons in an automobile than weight tons, they would normally be freighted on a measurement ton basis.

For example, a Volkswagen sedan I believe runs something over eight measurement tons, and runs in the neigh- [fol. 142] borhood of less than one weight ton.

Q. And would that same situation apply to all automobiles, to your knowledge? They are a measurement ton type cargo?

A. They would be in the typical foreign trade service.

Q. Aside from automobiles, when you speak of a measurement cargo as opposed to a weight cargo, is that expression related to its density or the amount of air in it, or what?

A. Well, it has a relationship, or is a relationship of bulk to weight.

Q. What would you call lead?

A. It would normally be a weight cargo.

Q. Furniture?

A. I beg your pardon?

Q. Furniture?

A. Normally it would be a measurement cargo.

Q. What trades is American President Lines in?

A. Well, we are in many trades throughout the world, for the reason that, in addition to having a purely trans-Pacific freighter service, we have a service that goes westbound around the world which takes it into many trades, and we also have a service from the Atlantic, United States Atlantic Coast through the Panama Canal to California, [fol. 143] and on to Malaya, and Indonesia, and back to California through the Panama Canal to the United States East Coast.

Q. When you spoke of American President Lines, in answer to a question by Mr. Madden, that most of APL's cargo is on a measurement ton basis, were you speaking of any particular service or of the whole around-the-world venture?

A. I was thinking of most all of the trade in which we participate. There are a few trades that run to heavy bulk or steel items that might be thought of as weight trades, but there are not many.

Q. You were asked what protests were received in connection with automobiles, and you responded that there

were two carriers. I think you named Wallenius Lines and Hanseatic Vaasa Lines, as well as some stevedores.

Do you know of any protests regarding automobiles that were made that did not originate with the carriage of Volkswagens?

A. I do not. Some of the statements made by the stevedores were general in nature, but from my knowledge of the background of their protest, and from my knowledge of what later contact the committee had with the protestants, it is my opinion that all of the protests on unboxed vehicles came from the carriage of Volkswagens.

* * * * * * *

[fol. 152] Q. Following the meeting, and I am referring to Exhibit No. 26, now, you received a letter from Mr. Curtis which put down in writing some of the contentions [fol. 153] made on behalf of the Volkswagenwerk people, isn't that correct?

A. Yes.

Q. Now, they had some suggestions in there as to what they thought might be done. I—as I understand it, the first suggestion, which was that automobiles or that instead of a tonnage assessment, there ought to be some kind of a unit assessment.

A. Yes.

Q. Well, what considerations did the committee give to that, and what did they think of it?

A. Well, I think the problem with that suggestion, is that it didn't really help the committee very much in deciding the issue, because if you were to accept a unit assessment you would still have to decide what the assessment would be, and we would again be back in groping for a solution to the problem Volkswagen presented to us that would not upset the overall program.

Q. Supposing you accepted a unit basis for all cargo, any piece of cargo would be assessed at a certain amount. What would that do to you?

A. Well, I am sure they didn't intend that, but if you did have such a system you would have units that would

be tiny boxes, and you would have units that would be locomotives, and obviously the function of the fund committee in that system then would be to take every single unit, and [fol. 154] on some principle—and I believe from what I have said here today you see that this would be a rather Solomonic act that would have to take place.

You would have to, for each unit, determine what charge should be made for the fund, taking into account all these various factors that have been mentioned.

Q. If you took the unit basis, because one bit of cargo asked for it, did you consider that it might result in other cargo asking for a unit basis?

A. We had real concern about their request in general that it would be upsetting and lead to a general running attack on the whole system.

Q. Now, they had another suggestion which related to the percentage of cargo handling expense, and one related to a percentage of total manifest freight.

A. Yes, sir.

Q. What did the committee do with that and consider about it?

A. Considering first the proposal that the assessment be based on a fixed percentage of the total cargo handling expense, that proposal was essentially a manhour proposal because virtually all of the cargo handling expense, with some qualification, is payment of wages to dock labor.

As I have indicated previously in my testimony, a manhour type of assessment was not considered appropriate [fol. 155] by the committee or the membership. The other suggestion is that the assessment be based on a fixed per cent of the total manifest freight. This would be a different and entirely new method than any of the PMA had used before, and it could lead to some odd results, though possibly any system in this field does, but bear in mind that the freight rate charged for commodities carried by ocean carriers is determined on a wide variety of bases, including what the traffic will bear, discharging or loading costs in other countries, the measurement, fre-

quently the claims potential of the cargo and, of course, subject to fluctuation where there are rate wars, it not being uncommon for cargo to be rated at less than half its former rate over a period of a few weeks, if there is a rate war.

It seemed to us that proposal, while it was a system, unlike the unit suggestion which really didn't help us, would create more headaches than it would solve and would not necessarily, as I see it, involve Volkswagen's problem, depending on how the formula was worked out, but I believe that a Volkswagen, at least in a berth trade, is rated something over $200 an automobile, and I would question whether this would solve their problem.

But in any event, that wasn't the test. The test was, was there a system or general application which would be satisfactory for the industry, and the committee didn't [fol. 156] think so.

* * * * * * * *

[fol. 158] Q. Does American President Lines carry any unboxed automobiles, Mr. Teige?

A. American President Lines does carry unboxed automobiles.

Q. And on what terms, berth terms or FIO?

[fol. 159] A. Where the automobiles are moving commercially, that is, shipped by commercial shippers, they are carried on a berth term basis. Where military unboxed vehicles are involved, they are carried on an FIO basis. That is, the military loads and discharges the vessel.

Q. Do you know from your knowledge in the committee, or otherwise, whether most liner operators have the same arrangement with respect to the carriage of unboxed automobiles; that is, they are carried on berth terms, except for the military?

A. Well, that is my understanding.

Q. How are the rates for the transportation of cargo set in liner operations, Mr. Teige?

A. In the foreign trades, most common is the method for the establishment of ocean freight rates through freight

conferences, which are associations in effect of carriers, in a particular trade, who have banded together for the purpose of jointly agreeing on the rates to be charged for the carriage of ocean cargo in the trade in which they are operating, and in the U. S. foreign trades those conferences have to be approved by the Federal Maritime Commission.

Typically, in a freight conference, the lines will establish by agreement the procedure whereby these rates will be determined, either by a majority vote or some other method, and then they place these rates in a tariff which is then [fol. 160] the tariff used by the carriers in the trade.

There are some trades that do not have conferences either because the conferences have disintegrated through competition or because maybe there are only one or two carriers in the trade.

Where that is the case, then each carrier independently determines its own rates, and would publish its own tariff. In the off-shore domestic trades, those rates are governed by the—and that is off-shore domestic United States trades —those rates are governed by the Federal Maritime Commission.

Q. How many conferences in their round-the-world services does American President Lines belong to, roughly?

A. My recollection is, it is some 30 or 40 conferences. The reason for that is that the conferences typically cover one trade between two countries, in one direction, so there are a wide variety of conferences, and many of those would be in the round-the-world service, foreign to foreign conferences.

Q. And not FMC regulated?

A. That is right.

Q. Do you belong to any conference on the Europe to the United States trade?

A. Yes, we belong to a conference from the Mediterranean to the Pacific Coast.

• • • • • • •

[fol. 181]

FRED R. SMITH for Complainant, Direct (continued).

By Mr. Madden:

Q. How long have you been discharging Volkswagens?

A. We had the original contract when they first started on the Coast, but I couldn't remember the exact day.

Q. Has it been as long as five years?

A. I believe it has been between five and six years.

Q. Do you discharge other automobiles?

A. Yes, sir.

Q. For whom?

A. Other steamship lines and other types of automobiles, numerous types and numerous companies.

Q. In the five to six years that you have discharged vehicles for Volkswagen, have there been any substantial improvements that you have been able to make in the method of discharge for the purpose of saving time and money?

A. Yes, we have improved on types of gear and methods of handling from experience, which develops over the years [fol. 182] from the acts of the stevedores who start out first, and ultimately gets to a more perfected operation.

Q. Has there been any change in the method?

A. No, sir.

Mr. Ransom: Excuse me, was that part of your question, or part of the testimony? I didn't understand.

Examiner Theeman: Would you read back the last two questions and answers, please.

(Record read.)

Mr. Ransom: Thank you.

By Mr. Madden:

Q. Is the improvement a result of more familiarity on the part of the stevedore with the method of removing the vehicle from the vessel to the dock, or have there been improved procedures?

A. It has been improving the operation within the general method of the discharging of the vehicles.

Q. Has the type of carrier that has brought those vehicles, Volkswagens, contributed to that improvement?

A. I would say it has assisted in it a degree, such as maybe the vessel might have a hatch that comes off more efficiently or faster than some other type of vessel.

• • • • • • •

[fol. 191] Cross (continued).

By Mr. Zimmerman:

Q. Well, let me go back a moment. You have indicated that you do stevedoring for both common carriers and for Volkswagenwerk itself, and on those automobiles you have an assessment in each case.

That is, you have assessments where the automobiles you had were for common carriers, and you also have assessments for the automobiles you have handled for Volks-

[fol. 192] wagenwerk?

A. Yes.

Q. Now, with respect to the mechanization fund assessments on automobiles that you have handled for common carriers, have you ever charged any part of those assessments to Volkswagenwerk?

A. Not to my knowledge, no, sir.

Q. Have you ever charged any part of the assessments for handling autos for Volkswagenwerk to the common carriers?

A. No, sir.

• • • • • • •

[fol. 197] Q. When you made the protest which you did make, was that at the request of the Volkswagen people?

A. I assume it was. Again, I was here on these particular documents, but jointly I assume, that we did the best we could to get what we thought at that time an equal amount of consideration in the M&M fund.

Q. You haven't answered my question, Mr. Smith. Did you have a request from Volkswagen to make a protest?

A. Oh, yes, yes, sir.

Mr. Ransom: That is all.

Redirect examination.

By Mr. Madden:

Q. Mr. Smith, when you are discharging Volkswagens, does your company furnish any equipment or facilities that are used in the discharge?

A. Yes, sir.

Q. What are they?

A. Slings, bridles, blocks or tools and equipment to let go of the lashing, whatever is necessary.

Q. Are these slings of any special nature for Volkswagens, or are they just general slings?

A. They are special.

Q. They belong to your company?

A. Yes, sir, purchased by the company.

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[fol. 205]

ELLET G. HORSMAN for Complainant, Direct (continued).

By Mr. Madden:

Q. Now, the commodity rate, according to the steve-
[fol. 206] doring order, includes opening and closing of hatches, rigging and unrigging, opening of cargo hatches, unlashing and unchalking of cars, waiting time of 30 minutes or less, whether in stevedore's control or not, but breakdown of ship's gear excepted, travel time, and transportation of equipment of longshoremen to and from vessel; supply of discharging gear in accordance with Volswagenwerk instructions; ten days free storage; the stevedores will provide all necessary stevedoring labor, including winchmen, hatch tenders, tractor operators, also foremen,

and such other stevedore supervision as is needed for the proper and efficient conduct of work.

Checking, clerking and super cargo; public liability and property damage insurance, including third party risk, in respect of injuries arising from stevedoring operations; also, taxes and Pacific Maritime Association assessments; and for handling cars from ship's tackle to place of rest, $6.00 per car, are to be collected from consignees and credited to vessel within the disbursements account; and this contains a remark that, "Wharfage on cars at $3.00 per 2,000 pounds for uncrated cars to be for consignee's account."

Now, this stevedoring order refers to Marine Terminals Corporation in San Francisco.

A. Yes.

Q. Now, is this the same type of service that is ren- [fol. 207] dered in Los Angeles?

A. Yes, this is a uniform stevedoring order for the Pacific Coast—this is uniform for California.

Q. In fact, then, in your unit rate for discharging Volkswagens out of chartered vessels, upon the order of Volkswagenwerk, you performed services which include removing the vehicle from the vessel to the dock, across the dock to a storage area, is that correct?

A. Yes.

Q. Including ten days free storage in the area?

A. The ten days free storage is an item that is in the Harbor Board's tariff, and the tariff states that all commodities will receive ten days free storage, inbound cargo.

Q. In the storage area, do you do any sorting of the cars as they come off the vessel?

A. We do, sir.

Q. And that is performed by your company's employees?

A. Yes, sir, the dock gangs.

Q. Dock gangs?

A. Yes. That is not a function of the ship. It is the function of a dock operation.

Q. Now, some of your gangs work exclusively aboard the ship, do they?

A. Yes, sir.

[fol. 208] Q. And others—

A. On the dock.

Q. On the dock?

A. Yes, sir.

Q. But they are all members of ILWU, are they?

A. That is correct.

Q. And your checkers and clerks are also members of ILWU?

A. Yes, sir.

Q. Now, do you perform similar services for any of the common carriers who bring Volkswagens to San Francisco or Long Beach?

A. Yes, sir.

Q. Do you perform discharge services for vehicles other than Volkswagens?

A. Yes, sir.

Q. And who would that be for?

A. The make of the automobile, or the company?

Q. The company.

A. American President Lines, d'Amico Mediterranean Line, Hanseatic Vaasa Line, either in whole or in part—I don't know what the contractual arrangement between the two partners are on the line—and Canadian Transport Company.

We have handled automobiles from Europe on specialty ships by Crown-Zellerbach Corporation, Blue Star Line, [fol. 209] and there are probably several others that I can't recall right now; and we also load automobiles.

Q. Do you load or discharge vehicles for the Government?

A. Yes, sir, we do. Marine Terminals Corporation of Los Angeles performs the stevedoring services for the U. S. Army Transportation Corps, Long Beach.

Q. Are those services that you refer to similar in nature to the ones you have described with respect to Volkswagens;

that is, a movement from point of rest to aboard the vessel, including into the vessel, or vice versa, from the vessel, to a point of rest?

A. That is the procedure here in California of a stevedoring operation, point of rest to storage, or vice versa.

Q. In handling vehicles for others, do you uniformly negotiate a rate on a unit basis, or do you have other bases for arriving at your compensation?

A. Well, there are three different ways in which automobiles can and are—

Q. I was asking about—

A. Volkswagens?

Q. No, about your company's negotiations for handling vehicles.

Mr. Ransom: He was about to answer you.

[fol. 210] The Witness: There are three different methods.

By Mr. Madden:

Q. That you use?

A. That we use, yes.

Q. Would you explain.

A. Oh, number one would be a unit basis similar to what we have with Volkswagen. Another arrangement is on what they call a fixed fee, and another item is on a cost-plus. In the fixed fee, it can be based either on a measurement or a weight or a unit.

Q. Would you explain a little more the fixed fee method? Is that a fixed fee for the total cost of discharging a particular number of vehicles from a particular vessel?

A. A fixed fee in a stevedoring sense, a contract or an agreement means that the stevedoring company would cover his total longshore payroll, plus his insurance and taxes, whatever they may be.

Then he receives fee either on a tonnage basis or a unit basis for the cargo he has handled.

On a commodity basis, the rate includes the longshore payroll, and the taxes and insurance, and your overhead, and to arrive at a rate you just divide the amount of tonnage that you are going to do in a gang hour, and you come out with a rate. That is the formula for a commodity [fol. 211] rate.

Before arriving at any rates at all, you will have to get your gang costs, plus your overhead, and then you arrive at your rate by dividing the number of units or tons or pieces into the total cost.

Q. The fixed fee basis is somewhat similar to a cost plus basis, then?

A. It all starts at a cost plus.

Q. All three?

A. You have to arrive at a cost plus before you arrive at any.

Q. And the basic cost from which you start is the cost of the labor?

A. The gang, yes.

Q. That is, the gang that you have to use?

A. Yes, sir.

Q. Both aboard the ship and on the terminal?

A. That is right.

• • • • • • •

[fol. 212] Q. Now, turning to the method of arriving at the charge per unit which is made for a vehicle, I believe you testified that the fundamental cost item was the gang hour necessary to discharge a particular vehicle. Is that right, or the particular number of vehicles?

A. Yes. In an hour, based on an hourly basis, you arrive at an hourly gang cost and, as I said, you divide your anticipated production into that cost, and I might say that that cost reflects more than just the cost of paying the men. It is taxes and insurance. It is overhead, and it is assessments.

• • • • • • •

[fol. 241] Q. Do you know whether there are any stevedores on the Pacific Coast who are non-members of PMA, who would be capable of discharging Volkswagen vehicles?

A. I certainly do.
Q. Is there any stevedores in existence?
A. I certainly do.
Q. Are there any?
A. There certainly is.
Q. And who would they be?
A. Well, there are people available that could do this work outside of the PMA, and I don't think my naming names will mean anything to the record, but there have been indications that we could lose our customer to an outsider.

• • • • • • •

[fol. 266] Redirect.

By Mr. Madden:

Q. For example, in connection with your discharge of paper, you mentioned some mechanized equipment. Is that equipment equipment that is owned by your firm?
[fol. 267] A. Yes. When I said mechanized equipment, it was equipment we have always used, but in many cases we could not use this equipment in certain ships in the hatch. The mechanization fund has given us the right now to take this equipment and move it in the hatch, and instead of man-handling it we use a machine.
Q. I see.
A. There is nothing new about the machine. It is just that we can put it in a different location.
Q. Do you have machinery on the wharf, also?
A. Oh, yes.

• • • • • • •

[fol. 277] PETER CURTIS for Complainant, Direct (continued).

Q. Mr. Curtis, you were here this morning when Mr. Horsman explained the contractual arrangements between Volkswagen and his companies for the performance of dis-
[fol. 278] charge services in San Francisco and Los Angeles, and rather than repeat that testimony, is there any facet of your contractual arrangement that you believe Mr. Horsman stated incorrectly or omitted?

A. I would say Mr. Horsman was his usual reliable self. I can't think of anything terribly significant that I would take strong exception to.

* * * * * * *

[fol. 302] Cross (continued).

By Mr. Ransom:

Q. Well—

A. They are paid for separately, over and above the commodity rate.

Q. Well, the commodity rates differ in Washington and Oregon from California?

A. It differs, yes, and it differs between San Francisco and Long Beach.

* * * * * * *

[fol. 303] Q. If there had been a six-month strike, even in June of '59 or in 1960, would you consider that that would have been a disadvantage to Volkswagen?

A. Any interruption, when you have ships under charter, is a disadvantage to somebody.

Q. To Volkswagen?

A. Presumably. Of course it would.

Q. And since 1961, if there were strikes or work stoppages, that disadvantaged Volkswagen, didn't it?

A. As it does anybody else who has cargo.

Q. And work slowdowns and work stoppages in longshore labor would have the same effect, wouldn't it?

A. Oh, yes.

* * * * * * *

[fol. 326] FREDERICK F. NOONAN for Complainant, Cross (continued).

Cross (continued).

By Mr. Ransom:

Q. You said that your tariff shows the measurement, and then a unit price for each automobile. Is the unit price then not based on a measurement scale, as related to the various automobiles?

A. The price is a unit price. Naturally it varies with the size of the car, large, larger cars taking more space in the ship command a higher freight rate, but the freight rate [fol. 327] is always quoted as a unit.

Q. Yes.

A. So that—

Q. But the variation between cars is in turn dependent for at least one of the factors on the measurement of the car?

A. That is correct.

Q. And not on the weight?

A. That is correct.

* * * * * * *

BEFORE FEDERAL MARITIME COMMISSION

EXHIBIT No. 4

PACIFIC COAST LONGSHORE AGREEMENT

June 16, 1961 - July 1, 1966

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION

And

PACIFIC MARITIME ASSOCIATION

* * * * * * *

SECTION 7

VACATIONS

7.1 Computation of vacations.

In any payroll year each longshoreman who is registered and qualified on December 31 of the calendar year in which he earns his vacation shall receive a vacation with pay the following year at the straight time rate prevailing on January 1 of the calendar year in which vacations are paid, as follows:

7.11 Basic vacation.

7.111 One week's vacation with pay, provided he has been paid for at least 800 hours but less than 1,344 hours in the previous payroll year;

7.112 Two weeks' vacation with pay, provided he shall have been paid for 1,344 hours or more in the previous payroll year;

7.12 Additional vacation.

7.121 One additional week's vacation with pay if he shall have qualified under 7.112 and shall have been avail-

able for employment for ten (10) years or more under the ILWU-PMA Pacific Coast Longshore Agreement or its predecessors for employers bound by such Agreement and if

7.1211 In the four major ports of Seattle, Portland, San Francisco and Los Angeles, he shall have been paid for at least 800 hours in each of ten (10) of the previous fifteen (15) payroll years.

7.1212 In all other ports he shall have qualified for a vacation as set forth herein in five (5) of the previous ten (10) payroll years.

7.122 One additional week's vacation with pay if he shall have qualified for one week under 7.111, two weeks under 7.112 or three weeks under 7.121, and if in each of any twenty (20) of his past years of service he has worked at least 800 hours under the ILWU-PMA Pacific Coast Longshore Agreement or its predecessors for employers bound thereby.

7.13 Modifications applicable to basic vacation and additional vacation:

7.131 With respect to any port except Seattle, Portland, San Francisco and Los Angeles: if 75 percent of the registered men in the port were not paid for 1,344 hours in such payroll year, then for such port for such year the 800-hour requirement of 7.111 shall be reduced to 700 and the 1,344-hour requirement of 7.112 shall be reduced to 1,200.

7.132 If 75 percent or more of the men registered on December 31 in any port were paid for 1,344 hours or more in the then ending payroll year, men who were paid for less than 1,344 hours shall not receive additional vacation under 7.121; and

7.133 If 75 percent of the men registered on December 31 in any port were not paid for 1,344 hours in

any payroll year after 1957, the 800-hour requirement of 7.122 shall be reduced to 700 for that year.

7.134 If 75 percent of the men registered on December 31 in any port were not paid for 1,344 hours in any payroll year, those longshoremen registered in such port who were paid for 700 hours or more in such payroll year shall be deemed to have satisfied the 800-hour test of 7.1211 for that year.

7.135 In calculating the percentage of men who are paid for 1,344 hours, all men who are paid for less than 100 hours shall be excluded. The "75 percent formula" shall be applied on a port by port basis, "port" to be defined as that port in which the longshoreman is registered, regardless of where he works. However, all hours outside of the home port shall be added to the total of his paid hours in his home port.

7.136 Qualifying hours for registered men 60 years of age or older shall be reduced to 700 hours and 1,200 hours respectively.

7.1361 In any port where qualifying hours are 700 and 1,200 as provided in 7.131, qualifying hours for men 60 years of age or older shall be reduced to 600 and 1,100.

7.14 Each week's vacation pay shall be 40 times the basic or skilled straight time rate. A skilled rate applies when at least half of the qualifying hours are at a skilled rate.

7.2 Qualifying hours and years.

7.21 Qualifying hours for vacation purposes shall include all hours for which pay is received except previous vacation time.

7.22 Qualifying hours shall be limited to hours paid for by individual employers or parties to this Agreement and to other hours as to which employers participating in the vacation plan in the port area make the required pay-

ments to the Association. Hours paid to any longshoreman in any port area covered by the Agreement, other than that in which he is registered on December 31, shall be added to paid hours in his home port, provided, however, that such longshoreman either shall have been granted authorization in the customary manner to visit other port areas or shall have been transferred on the registered list in accordance with the rules and with the consent of the Joint Port Labor Relations Committees. A longshoreman who has received pay for work under this Agreement in more than one port area during the preceding payroll year must file a claim in the port where he is registered by February 1 of the calendar year in which vacations are paid, setting forth the details of his employment during the preceding payroll year.

7.23 Registered longshoremen shall be credited with hours paid for as longshoremen, clerks, or other employment under collective bargaining contracts to which the Union and the Association are parties, but no worker shall receive two vacations in the same year, one under this Agreement and another under any other agreement.

7.24 Registered longshoremen shall be credited with hours at court as jurors, including waiting time under court order, as certified by the clerk of the court.

7.25 In the major ports (Los Angeles-Long Beach Harbor area, San Francisco Bay, Portland Harbor, Seattle and any other port which cannot be classified as a minor port) if a man suffers an industrial injury on the job he shall be given credit, up to 100 hours maximum, of 40 hours per week when off a full week and eight (8) hours per day when off part of a week. He shall be given a similar credit for proven non-industrial illness or injury. In order to qualify for such credit the man must have averaged 27 hours per week for the four-week period prior to the injury or illness and 13 hours per week averaged over an eight-week period after he returns to work. In the

minor ports (defined as any port other than the four mentioned above—in which more than 25 percent of the registered men were paid for less than 800 hours during the preceding payroll year) a man must have been paid for an average of 14 hours per week for the four-week period preceding the injury or illness and 8 hours per week averaged over an eight-week period after he returns to work.

7.26 In computing years of service under 7.12:

7.261 Continuous absence from employment because of industrial illness or injury arising out of employment under this Agreement compensated for under a State or Federal Compensation Act shall be considered qualifying time.

7.262 Service in the Armed Forces of the United States or employment by the United States as a civilian in longshore operations in World War II and the Korean War, that occurs after registration, shall be considered qualifying time.

7.263 Service as a full-time Union official or of a registered longshoreman employed as a joint employee of a labor relations committee, welfare fund, pension fund, or other joint entity of the parties shall be considered qualifying time.

7.264 When any longshoreman is absent less than the full calendar year, he shall receive only proportionate credit for qualifying time.

7.27 Any employee who has been registered in both a small port and a large port during the period in which he claims to have satisfied the requirements of 7.121 for a third week of vacation must satisfy the requirements of 7.1211, but for such purposes he shall be given double credit for any year in which he worked at least 800 hours in a small port, and for each such year of double credit the 15-year spread shall be reduced by one year.

7.28 Where a longshoreman has been paid for work in part of the year both by the Union or its longshore locals and by the Employers and the total amount thereof qualifies him for a vacation, his vacation shall be paid by the Employers and the Union on a pro rata basis.

7.3 Vacation procedure.

7.31 The method and procedure for scheduling vacations shall be those which have been in effect since 1951. Vacation periods may be scheduled during any month(s) of the calendar year by the Joint Labor Relations Committee of each port who will also schedule vacations on a full week by week basis when so requested by the man.

7.32 Each registered longshoreman entitled to a vacation shall take his vacation at the time scheduled.

7.33 A registered longshoreman whose registration is cancelled after he shall have fulfilled all requirements for a vacation during the previous payroll year shall receive vacation pay at the time agreed to by the parties.

7.34 If a registered longshoreman dies after he has worked the required hours for a vacation, his vacation pay will be paid to his widow or beneficiary.

7.35 If a registered longshoreman retires under the ILWU-PMA Pension Plan or leaves his job under the ILWU-PMA Mechanization and Modernization Plan after, in either case, he has worked the required hours for a vacation, he shall receive his vacation pay at the time agreed to by the parties.

7.4 Administration.

7.41 Each employer agrees to pay a proportionate share of the vacation pay of each longshoreman working in any particular port, the amount of and the eligibility for such vacation to be fixed in accordance with 7.1, and the individual share of each employer to be determined as follows:

7.411 The individual employer will be liable for a share of the vacation pay payable to every longshoreman working in each port in which the member has employed any longshore labor.

7.412 Each individual employer's liability for each eligible longshoreman's vacation pay shall be the proportion of the individual's pay that is equal to the proportion that the total number of longshore hours of work performed for that member in that port bears to the total number of longshore hours of work performed by all employers in that port participating in this vacation plan. It is the purpose of this 7.41 to provide for a several liability for each employer and to provide for a liability from every employer participating in the vacation plan in a port to every longshoreman in the port who is eligible for vacation pay under 7.1 hereof.

7.42 The Pacific Maritime Association shall be the disbursing agent under this Agreement and shall make vacation checks available in the same manner as regular pay checks are made available in each port area. Vacation checks will be available for distribution in the first week of May of the calendar year in which the vacations are paid.

7.43 Any public port or port commission may become a party to this vacation agreement by notifying the Union and the Association, prior to the first day of the calendar year in which the vacation is to be taken. Similarly, any or all of the Armed Services may become parties. In the event that one or more public ports or Armed Services becomes a party to the agreement, said port(s) or Service(s) shall be placed in the same status as an individual employer member of the Pacific Maritime Association for all the purposes of this Agreement.

7.44 Nonmember employers may participate in the vacation plan in accordance with the conditions thereon fixed by the Association.

* * * * * * *

BEFORE FEDERAL MARITIME COMMISSION

EXHIBIT No. 50

(Letterhead of Seattle Stevedore Co.,
Seattle 4, Washington)

November 30, 1961

Mr. Peter Curtis
Winchester Agencies, Inc.
351 Califorina St.
San Francisco 4, Calif.

TERMINAL & STEVEDORING SERVICES
VOLKSWAGEN CHARTER VESSELS

Dear Sir:

We wish to acknowledge your letter of November 15, 1961 regarding the above subject, as well as our recent discussions in San Francisco on November 24th relating to this subject and the Modernization Fund assessments.

In accordance with the terms of your letter, we are agreeable to perform services for these vessels as specified in "Stevedore Orders" or "Work Orders" issued by Messrs. Volkswagenwerk. This contract will be on the same basis as in the past, however, will be with Winchester Agencies, Inc., and we will bill accordingly through your local Agents, International Shipping Co., Inc., Seattle.

Regarding the Modernization assessment, we have previously notified your company that we could not handle the discharge of these autos under the existing contract rates without being guaranteed payment of this assessment, inasmuch as, you certainly know, there is nothing in our present rates to make such an absorption. This, on our rates in the Puget Sound area, could be 40% or more of the rate.

We are certainly in sympathy in your efforts to secure an adjustment of this rate which, we feel, is discriminatory and we will do all possible with the Pacific Maritime

Association to secure such an adjustment. You, however, are fully aware of the thinking of these people and sometimes it seems their decisions do not necessarily reflect the merits of a case. We will continue to bill the present assessment with the understanding that you are presently not paying these charges until an adjustment is made or the legality and equity is tested.

Very truly yours,

SEATTLE STEVEDORE CO.

/s/ M. M. STEWART
M. M. Stewart
Vice President

MMS:ek
cc: International Shipping Co., Inc., Seattle.

EXHIBIT No. 57

BEFORE FEDERAL MARITIME COMMISSION

(Letterhead of Pacific Maritime Association,
San Francisco 11, Cal.)

MEMBERS:

MODERNIZATION AND IMPROVEMENT FUND
TONNAGE ASSESSMENTS

Members were notified by our letter dated December 14, 1961 of a rate reduction in the present M & I Fund Tonnage Assessment and the establishment of a new tonnage assessment for a Walking Bosses and Foremen's Mechanization Fund.

The change in rates of the present M & I Fund tonnage assessment from 27½¢ to 24½¢ on general cargo, lumber, logs, and automobiles, and from 5½¢ to 5¢ on dry bulk cargo is effective on all loading and discharging operations commencing in any Pacific Coast port on and after 8:00 A.M., December 18, 1961. At the identical time, a 4¢ per ton assessment becomes effective on general cargo, lumber, logs and automobiles for a Walking Bosses and Foremen's Mechanization Fund.

Since the changes are effective in mid-month, it will be necessary to segregate tonnage assessable at the old rates from that assessable at the new on the Monthly Report of Tonnage (Form CDT-1) for December 1961. Reports of Assessable Tonnage for the Mechanization Funds can then be prepared in the following manner:

Shipping Company Members:

(a) prepare the usual forms MI-102 for the tonnage assessable at the old rates.

(b) prepare separate forms MI-102 for tonnage assessable at the new rates. It will be necessary to segregate the Walking Bosses and Foremen's assessment from the regular assessment. This can be accomplished in the following manner on Form MI-102:

	Tons	*Rate*	*Amount*
General Cargo, etc.	1,000	.245	$245.00
Bulk Dry Cargo	1,000	.05	$ 50.00
		Total	$295.00
Walking Bosses & Foremen	1,000 tons @ .04		$ 40.00
			$335.00

Stevedore Contractor Members:

Stevedore Contractors reporting assessment on non-member tonnage should follow exactly the instructions set out under (a) and (b) above except they should use form MI-100 instead of form MI-102.

It will be necessary on all future reports to list the Walking Bosses and Foremen's assessment separately as outlined above.

K. F. Saysette,
Vice President & Treasurer

KFS:IM

[fol. 751]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840

VOLKSWAGENWERK AKTIENGESELLSCHAFT, Petitioner,

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, Respondents,

PACIFIC MARITIME ASSOCIATION,
MARINE TERMINALS CORPORATION, Intervenors.

On Petition to Review and Set Aside Order of the Federal Maritime Commission

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OPINION—Decided December 22, 1966

Mr. Walter Herzfeld, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. Richard A. Whiting* and *Robert J. Corber* were on the brief, for petitioner.

Mr. Walter H. Mayo, III, Attorney, Federal Maritime Commission, with whom *Assistant Attorney General Turner, Messrs. James L. Pimper,* General Counsel, [fol. 752] *Robert N. Katz,* Solicitor, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Mr. Gary J. Torre, of the bar of the Supreme Court of California, *pro hac vice,* by special leave of court, with whom *Mr. Edward D. Ransom* was on the brief, for intervenor, Pacific Maritime Association.

Mr. Arthur R. Albrecht entered an appearance for intervenor, Marine Terminals Corporation.

Before McGowan, Tamm and Leventhal, Circuit Judges.

Per Curiam: This case is before this court on a petition to review and set aside an order of the Federal Maritime Commission. Petitioner is a German corporation which manufactures Volkswagen automobiles. It ships large quantities of automobiles to ports on the Pacific Coast by means of common carrier and chartered vessels. Marine Terminals Corporation [hereinafter MTC], respondent below, intervenor here, operates ocean terminals at San Francisco and Long Beach, California, where it provides stevedoring services for both common carriers and charter vessels. Pacific Maritime Association [hereinafter PMA], intervenor below and before this court, is a nonprofit corporation made up of common and contract carriers, marine terminal operators, and stevedore contractors. PMA was organized in 1949 for the purpose of negotiating and administering labor contracts with labor unions on behalf of its members. MTC is a member of PMA; Volkswagen is not, since shippers are not eligible for membership in the organization.

I.

In order to understand the present controversy between the parties, it is necessary to review briefly the origins [fol. 753] of their dispute. As noted, PMA serves as the collective bargaining representative for its members. In 1957 the members desired to introduce work-saving devices into the industry and to be free of strikes and slowdowns during the period of transformation to greater mechanization. In its capacity as the representative of longshoremen and marine clerks, the International Longshoremen's and Warehousemen's Union [hereinafter ILWU] desired assurances from PMA that its members would share in the monetary benefits realized from the introduction of work-saving devices.

As a result of extensive negotiations between PMA and ILWU, a "Mechanization and Modernization Fund" of $29,000,000 was agreed upon. This fund was to be collected over a nearly six-year period from PMA members and to be used to cushion the effects of higher production upon longshoremen and marine clerks displaced by the mechanization. Since PMA's membership was responsible for payment of the fund, the ILWU agreed to allow PMA to be sole determinator as to how the fund should be accumulated. The necessity for the fund itself is not here in controversy; in fact, all parties agree that it serves a salutary purpose. What is in controversy is the funding method approved by PMA to raise the money from its members.

In order to determine how its members should be assessed in accumulating the fund, a Work Improvement Fund Committee was appointed by PMA. The majority of the Committee recommended that members should be assessed on the basis of tonnage carried or handled, with bulk cargo being assessed one-fifth the rate of general cargo.[1] The rate for general cargo was set at 27½¢ per [fol. 754] ton carried or handled; the special category of bulk cargo was to be assessed at 5½¢ per ton carried or handled. Each member of PMA was to remit to PMA, as trustee for the fund, an amount equal to the per tonnage assessment, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement.

The Committee recommended that the assessment be based on the cargo "as manifested" for loading or discharging at Pacific Coast ports. Usually any particular type of cargo is manifested, consistently, either on a weight or measurement basis. Thus the amount of the assessment for any particular commodity would be directly re-

[1] In adopting the majority report, a minority report recommending that a combined man-hours—tonnage method of assessment should be used was rejected.

lated to whether that commodity was manifested by weight or measurement tons.

There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown (the unit price including costs, overhead and profit to the terminal operator, as well as an assessment for PMA dues.) On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight.

Despite the fact that automobiles were manifested in these different ways, PMA determined that automobiles should always be assessed for the mechanization fund on a measurement ton basis regardless of how they were manifested. This treatment of automobiles was in contradistinction to all other cargo which was assessed according to the manner in which it was manifested.

II.

Cast against this background, Volkswagen's grievance comes into sharper focus. If considered on a measurement ton basis, a Volkswagen automobile measures 8.7 tons, whereas if a weight ton basis is utilized, it measures [fol. 755] only 0.9 tons. An assessment for the fund based on measurement tons at 27½¢ per ton equals $2.35 per automobile; the same assessment based on weight tons equals $.25. Thus the utilization of the measurement ton as the standard results in an assessment more than ten times greater than if the weight ton were to be used.

Volkswagen promptly protested to PMA the "discriminatory burden" imposed upon automobiles in general and Volkswagens in particular. Since this make of automobile constitutes by far the largest number of automobiles imported through Pacific Coast ports, the "ten times heavier tax," it argued, was in fact an excessive tax on Volkswagens. In addition, Volkswagen protested favorable treatment accorded by PMA to scrap metal and lumber

cargo which were relieved of paying a major part of the assessment by virtue of "depressed" conditions in these industries. Petitioner also argued that the "tax" was particularly inequitable as applied to its operations since, because of previous modernization made in the handling of automobiles, no substantial savings could be expected in the handling of Volkswagens as a result of the institution of the mechanization fund. Petitioner's arguments to PMA were to no avail; Volkswagen has, however, refused to pay the assessment as calculated on a measurement ton basis.

Volkswagen's refusal to pay the assessments on its automobiles prevented the terminal operators (and particularly MTC) from paying to the PMA fund the assessments due on this cargo. It was both theoretically and practically impossible for the terminal and stevedoring companies to absorb the 27½¢ per ton assessment on automobile cargo ($2.35 per auto) since their profit per automobile does not exceed $1.00. MTC sought advice from PMA as to what "stand we can take in demanding payment of the assessment." MTC requested PMA's Board of Directors for authority "to bring suit against Volks- [fol. 756] wagen for the monies due." Rather than have MTC sue Volkswagen directly, however, it was determined by PMA that it would sue MTC and the other onshore operators engaged in discharging Volkswagen automobiles and they would in turn implead Volkswagen. PMA did bring suit against MTC in the United States District Court for the Northern District of California; when Volkswagen was impleaded by MTC, the District Court stayed the proceedings in that court at the request of Volkswagen to enable it to institute proceedings before the Federal Maritime Commission under the Shipping Act of 1916, amended, 46 U.S.C. § 801 *et seq.* (1961). The district court granted the stay and petitioner began these proceedings.

The following issues were submitted to the Commission for its determination:

"1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15[2] of the Shipping Act, 1916, as [fol. 757] amended, 46 U.S.C. 814 (1961), before it is

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[2] Section 15, 46 U.S.C., section 814.

* * *

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.

* * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815.[3]

[fol. 758] 3. Whether the assessments claimed from [Volkswagen] constitutes an unjust and unreasonable practice in violation of Section 17 . . ."[4]

Subsequently hearings were held, and the Examiner issued his initial decision finding, *inter alia*, that MTC and PMA were persons subject to the Shipping Act and that the agreement entered into between MTC and other PMA members was a "cooperative working arrangement." The examiner went on to find, however, that the cooperative working arrangement between MTC and the other members of PMA was not such an arrangement required by Section 15 of the Shipping Act to be filed with and ap-

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[3] Section 16, 46 U.S.C., section 815.

* * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[4] Section 17, 46 U.S.C., section 816.

* * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

proved by the Federal Maritime Commission. The Examiner also found no violation of Section 16 or 17 of the Shipping Act.

Before the Commission, both MTC and PMA contested its jurisdiction, MTC arguing that they were not "other persons" under Section 1 of the Act[5] and PMA arguing [fol. 759] that the exclusive jurisdiction given the National Labor Relations Board over collective bargaining precluded the Commission from having jurisdiction in the instant case. The Commission did not resolve the jurisdictional question, but rather assumed for the purposes of its decision that both MTC and PMA were subject to the Act. Even though it found the literal language of Section 15 broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Act, the majority of the Commission held Section 15 inapplicable to PMA's agreements regarding the mechanization fund because it interprets that section to apply

> "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives."

The agreement among the members of PMA, the Commission found, was not, standing alone, such an agreement that would affect competition by parties in vying to serve outsiders who are not parties to the agreement. In order to find a Section 15 agreement, the Commission held that there must be demonstrated that there was "an additional agreement among the PMA membership to pass on all or a part of its assessments to the carriers and shippers served by the terminal operators." The Com-

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[5] The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. § 801.

mission determined, however, that the "record is devoid of evidence showing the existence of such an additional agreement."

The two dissenting Commissioners did not agree with the majority members on this point, arguing that Section 15 requires that the agreement in question should have been filed with the Commission.

The Commission further found that no violation of Section 16 existed because petitioner had failed to show that cargo competitive with its automobiles (id est, other [fol. 760] automobiles) had been preferred. As for Section 17, the Commission, although noting that MTC conceded that "the method of assessment against automobiles on a tonnage basis is unfair," found no "unreasonable practice" because "there is no statutory requirement that all users of a facility be assessed equally."

III.

Petitioner argues ably and earnestly before this court that the Commission has erred in approving the agreements involved in this case. It charges that PMA is dominated by liner interests and that the discriminatory "tax" on Volkswagen automobiles has been meted out to transfer to Volkswagen the financial burden which liner cargo should be carrying. It argues that the PMA committees set up to implement the funding of the mechanization fund are controlled by the shipping lines who are members of PMA and that the decision regarding how heavily automobiles should contribute to the fund always lay with these shipping lines.[6] Since over seventy per cent of Volkswagen's

[6] It is interesting to note in this regard that under PMA's by-laws, its carrier membership have a majority on its Board of Directors and the controlling vote at membership meetings. In addition, carriers furnish all the members of both the PMA committee appointed to consider how the cost of the mechanization fund should be allocated and the committee subsequently formed to pass upon any inequities resulting from that method. Neither committee included any independent terminal operators or steve-

automobiles arrive by chartered vessel (non-PMA members) and many of the remainder are carried by liners not members of PMA, the higher automobile tax falls heaviest [fol. 761] on Volkswagen and serves to lessen the amount of assessment on other general cargo carried by the shipping lines who are PMA members. Volkswagen charges that PMA is attempting to utilize automobile cargo, which the liner interests do not in the main carry, to subsidize other forms of cargo carried by the liner interests. Volkswagen further charges that on all cargo loaded or discharged on behalf of PMA's carrier members, the carrier member must bear the cost of the mechanization fund payments; however, on cargo arriving by chartered vessel (such as seventy per cent of Volkswagen), the burden of the tax falls upon the non-PMA member shipper (Volkswagen). Thus it is to the financial advantage of PMA liner members to place a disproportionately heavy assessment on automobiles.

With respect to the question of whether there was an agreement in this case under Section 15, petitioner argues that the collective action engaged in by the members of PMA as embodied in its agreements is exactly the type conduct which Congress intended to regulate when it passed the Shipping Act. It states that Section 15 requires the filing and approval of *every* agreement, by which is meant as well as an "understanding," falling into one of seven categories enumerated in the Act. (See note 2, *supra*.) Included in these categories is any agreement

> "fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement."

Petitioner argues that, giving the statutory language its plain meaning and a reasonable interpretation, the PMA

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doring contractors. The hearing examiner found "that there is no substantial evidence in the record to support Volkswagen's contention that liner interests dominate PMA."

agreements clearly serve to bring about all of these proscribed consequences.

Petitioner also attacks the Commission's holding that a Section 15 agreement must be between parties in competition with one another and its further holding that the [fol. 762] agreement must relate to a specific aspect of the competition between them, that is, competition with reference to the "shipping or travelling public, or other representatives." Such a reading of the Act is far too narrow, it argues, and all but emasculates the Act as an effective means of regulating congressionally proscribed conduct in the industry. Moreover, the Commission's interpretation serves to remove from the Act's jurisdiction agreements involving persons between whom no competition has ever existed as, for example, an ocean carrier and a freight forwarder, both of whom are subject to the Act.

Finally, petitioner argues with respect to Section 15 that, even if the Commission's construction of the statute were on sound ground, it would still have erred in concluding that such construction left the cooperative working arrangement outside Section 15. As the Commission made plain, it would have found such arrangement within the statute if there were

> "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators."

Petitioner attacks the Commission's characterization of the record as being "devoid of evidence" showing the existence of such an additional agreement. It points to the fact that, as a logical and practical matter, it necessarily had to be within the contemplation of the PMA terminal operator members and stevedoring companies that the assessment would be passed on to shippers because when MTC and the other PMA members voted the assessments they knew that they could not pay them without increasing their charges to petitioner. The assessments, it is argued, "were agreed to with this as a silent predicate. There was

no need to secure explicit agreement regarding action to which there was no alternative." Petitioner further argues [fol. 763] that all involved knew that the passing on of the PMA assessment to Volkswagen was an integral part of PMA's program. Thus, when Volkswagen refused to reimburse MTC, PMA made no serious attempt to collect the assessments from MTC nor did it dispute MTC's description of itself as "only a collection agency" in the matter. Petitioner points further to the fact that MTC has never made any payments to PMA on cargo on which Volkswagen has refused to recognize any obligation to pay, although MTC has made all other payments called for by the cooperative working arrangement. This conduct, petitioner argues, demonstrates an "understanding" within the contemplation of Section 15 to pass on the assessments to petitioner.

Petitioner also attacks the Commission's determination that there was no Section 16 violation involved in this case because petitioner had failed to show that cargo in competition with its automobiles had been preferred. Petitioner argues that, although past precedents of the courts and Commission support a "competition" requirement, more recent cases have done away with such a requirement. It argues that the focus of the Commission should be on the fact that the assessment of automobiles based upon measurement tons coupled with favored treatment given other cargo serves to provide other cargo with a "preference and advantage" not granted petitioner, which is undue prejudice in clear violation of the Act.

With respect to Section 17, petitioner argues that the Commission erred in not finding an unreasonable and/or unjust practice by MTC in the execution of the PMA agreement. It faults the Commission for failing to look at the method for allocating the cost of the fund, and for failing to consider under Section 17 the making of the monthly payments to PMA by the terminal and stevedoring companies. It argues that the cooperative working arrangement among the membership of PMA is, in fact,

illegal under the antitrust laws as a price fixing arrange-
[fol. 764] ment and therefore necessarily unreasonable under Section 17 and that the arrangement is inequitable because it distributes a common cost in an unfair and unreasonable fashion. Finally, it attacks the Commission's determination that there need only be "substantial benefits" accruing to one against whom a charge is levied, and its decision that it is not necessary that benefits and burdens be directly related.

IV

Before deciding the questions proposed here, reference must be had to the principles which are to guide us in reviewing decisions of an administrative agency such as the Federal Maritime Commission. Our touchstone here has to be the Supreme Court's recent decision in *Consolo* v. *FMC*, 383 U.S. 607 (1966), where the Court, in the course of reversing a decision of this court, spoke at length concerning the meaning of the substantial evidence rule which appellate courts are to apply to decisions of the Federal Maritime Commission. In *Consolo*, the Court stated:

> "Section 10(e) of the Administrative Procedure Act . . . gives a reviewing court authority to 'set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . . Cf. *United States* v. *Interstate Commerce Comm'n*, 91 U.S.App.D.C. 178, 183-84, 198 F.2d 958, 963-64, *cert. denied*, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Eidson Co.* v. *Labor Board*, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This

> is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative [fol. 765] agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.
>
> Congress was very deliberative in adopting this standard of review. It frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps to promote the uniform application of a statute."

Although numerous statements and re-statements of the substantial evidence rule as interpreted and applied by federal appellate courts might also be cited, we believe that what was recently said by this court in *Philadelphia Television Co.* v. *FCC.* —— U.S.App.D.C. ——, —— F.2d —— (No. 19,577, March 28, 1966) has particular relevance with respect to the task confronting this court in reviewing the decision of the Commission in the instant case. There we said that

> "to sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceeding."

Deference must also be paid in this case to the Commission's expertise, especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.

Applying these general principles to the specific issues before us in this case, and giving due deference to the expertise of the Commission, we conclude (albeit with some hesitation) that there is substantial evidence in the

record considered as a whole to support the Commission's decision. The Commission's conclusion that the funding agreement standing alone does not come within the provisions of Section 15 is a tenable one and not arbitrary or capricious, especially in view of the paucity of dispositive precedent on the question.

[fol. 766] The Commission's determination that the record is "devoid of evidence" showing the existence of an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators presents a closer question. Petitioner points to a number of factors which tend to demonstrate the existence of such an agreement.[7] In addition, petitioner points out that as a practical and logical matter MTC had no choice but to pass on the cost of the assessment to the shipper since it was compelled to do so by economic necessity. Since MTC and the other terminal operators and stevedore companies were members of PMA, and since the logical and necessary consequence of their agreement to make the assessment was that such assessments would have to be passed on to the shippers, it necessarily follows that there was at least a tacit agreement among the terminal operators and stevedore companies that the assessment would be passed on to the shippers. Petitioner, however, is not able to point to

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[7] This evidence includes: a telegram from one of the PMA members handling Volkswagens expressing the opinion that the cost could never be assumed by the stevedore companies; a letter from MTC to PMA advising that "there is no way that the contractor could absorb such an increase"; a letter from MTC to PMA in which MTC described itself as "only a collection agency in this matter"; a letter expressing PMA's fears that if Volkswagen received a new rate the Army would demand the same for the transport of its automobiles; an inter-office PMA memo stating that the funding committee did not feel that the then present assessment worked a hardship on the *shipper;* minutes of a PMA meeting expressing the opinion that the money owed was due from Volkswagen and not MTC; the creation of an escrow agreement for payments of funds *on behalf of Volkswagen* (payment to be made by the stevedores).

any direct testimony establishing that such an agreement was made.

[fol. 767] In the face of the evidence relied upon by petitioner and the forceful logic of its argument, the Commission held that

> "to hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement."

The question we must decide is whether the record considered as a whole contains substantial evidence to support the Commission's finding. It should be noted that what we are here concerned with presents essentially questions of fact—did the agreement take place, was there an "arrangement" between the parties, etc. Moreover, questions of credibility are involved since witnesses for PMA affirmatively denied the existence of any such agreement or arrangement, and the Examiner, who had an opportunity to observe the witnesses, found no agreement. In these circumstances, we believe that there is substantial evidence in the record considered as a whole to support the Commission's conclusion. Although we might be inclined to reach a conclusion different from that of the Commission were we considering the question *de novo,* or under a less restricted power of review than that enunciated in *Consolo, supra,* we are bound to give the Commission's decision the benefit of all reasonable inferences and our conclusion in so doing is that the Commission's determination that there was no additional agreement is supported by substantial evidence.

Turning next to Section 17,[8] careful consideration has [fol. 768] been given by the court to petitioner's contention

[8] Section 16 will be considered, *infra,* since our conclusions with respect to Section 17 have relevance in the resolution of petitioner's

that the laying of the mechanization fund assessment on automobiles on a measurement basis rather than the weight basis used on the Volkswagen cargo as manifested is "an unreasonable practice . . . relating to . . . the handling of property" in violation of Section 17 of the Act.[9] The prob-

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claim that it is a victim of discrimination in violation of Section 16. We reject at the outset of our discussion of Section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment.

[9] The Commission's opinion concerning this issue recognized the salient facts relied on by petitioner and disposed of the problem with reasoning discussed, *infra*. The Commission said:

> It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.
>
> However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Cooperage Co. Inc.* v. *Board of Commissioners,* 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.
>
> The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund [11] assessment

[fol. 769] lems of the case under Section 17 are perhaps most clearly focused by adverting to the opinion of the dissenting member of the Commission, who concluded that PMA's entire system of measurement and allocation of this type of labor cost is unjust and unreasonable. In his view the core injustice ensued when PMA adopted the recommendation of a majority of its committee, which recommended a property basis of allocation of the assessment (in accordance with tonnage), whereas only through a labor measure of allocation such as that recommended by the minority (*id est,* man-hours with adjustments for inequities) can the burden of this labor cost become a just cost of business. The property measure, he concluded, opens the door to a singling out of particular traffics or persons for disadvantage, and this, in turn, is possible because PMA's control of the market precludes corrective control by competitive forces.

The majority of the Commission was aware that a minority of PMA's committee recommended that the assessment be based in substantial part on the relative man-hours of the various stevedoring companies involved. Indeed, as the Examiner noted, the first $1,500,000.00 mechanization fund raised by PMA, during 1960, pending the report of the Committee, had been collected on a man-hour basis. However, PMA members complained that this method was unfair, and the majority of the Commission concurred in this conclusion.

[fol. 770] Our examination of the PMA Committee report and the reasoning supporting its conclusions leads us to conclude that the assessment was reasonable. It appears that the Committee began by considering the possibility of apportioning the assessment on the basis of who obtained a savings as a result of now-permitted mechanization. An

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on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

expert of the Bureau of Labor Statistics was engaged to explore the possibility of measuring productivity improvement. The PMA turned away from this approach, partly because it feared that its adoption would help the Union enlarge its later demands and partly because the system was unfeasible due to complexity, including the difficulty of determining which savings were attributable to this or other factors. The Committee felt it to be essential to arrive at a system that would not be excessively burdensome to anyone, yet would be simple in its administration.

In rejecting continuance of the initial man-hours basis,[10] the majority of the Committee reported:

> "They were struck by the inequity of a contribution formula based on man-hours which would provide for a decreasing percentage of the total contributions to the Fund by the operators which made greatest use of and received the greatest benefit from the new agreements, and were most contributing to the loss of work opportunity that gave impetus to the Union's demand for the fund and would be invoked in future bargaining as the ground for continuing the Fund."

The Committee was troubled by the inequity of most rewarding with low assessments those who had already mechanized most when it was their past reduction of work hours that had galvanized the Union into the activities that led to this industry-wide labor cost assessment.

The Committee recommended a formula based on cargo [fol. 771] tonnage as a "rough-and-ready" way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It considered that cargo volume though not necessarily

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[10] The majority considered that the reasons against continuance of a man-hour basis also militated against partial reliance on this factor, as recommended by the majority.

proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.

The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop.

It may be noted that the Union had proposed that a tonnage formula be incorporated in the collective bargaining agreement, but the PMA did not wish to limit its discretion in seeking and determining the most reasonable formula it could devise. Petitioner could presumably have had no complaint if PMA had acquiesced in the Union's demand. The PMA told the Union it wanted flexibility to allocate the labor cost on the basis of tonnage man-hours or both, and the Union agreed to let PMA decide the matter. (PMA also feared a tonnage charge levied under a Union agreement would have a tendency to persist into the next contract.)

In view of the foregoing, we cannot say that PMA was unreasonable in arranging for an allocation of this industry labor cost in accordance with volume tonnage already in industry use for a portion of PMA's dues. Tonnage dues, based on revenue tons of cargo, had been used for many years by PMA. PMA's function and budget relate primarily to the negotiation and administration of union labor contracts. There was therefore in effect an industry custom and practice for using revenue tonnage for the pur- [fol. 772] pose of allocating sundry labor costs. The mechanization fund is an additional labor cost administered by PMA.

Petitioner complains of the inequitable "tax" laid upon it. This use of the word "tax" is forensic rather than analytical, but it calls to mind various decisions which if anything militate against its declaration of arbitrariness. "Administrative convenience and expense in the collection

or measurement of the tax" is a valid ground of classification in arranging the incidence of taxation. *Southern Coal & Coke Co.* v. *Carmichael*, 301 U.S. 495, 511 (1937). There is no requirement that for every payment there must be an equal benefit. *Houck* v. *Little River Drainage Dist.*, 239 U.S. 254, 264-65 (1915).

The Commission's doctrine follows the same line. Thus in *Evans Cooperage, Inc.* v. *Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415 (1961), a city's uniform wharfage charge was upheld, even though applied to cargo transferred from a barge to a vessel moored at a wharf without moving across the wharf, on the ground that "substantial benefits" were provided for the person being charged. The Commission noted that the barge and cargo enjoyed substantial benefits from the services and facilities, that "there can be no precise equivalence between services and charges" and that the service was "reasonably related to the charges."

The Commission upheld the assessments before us, noting the substantial benefits accruing to all cargo from the mechanization agreement. As the Commission noted, this is not to say that the mere existence of substantial benefits permits a tax laid solely on one sub-class of the persons benefited. The Commission would presumably agree that the mere existence of the substantial benefits would not immunize an unreasonable classification system or egregious discrimination.[11] It does serve, however, to [fol. 773] protect a system, reasonable on its face, that uses a "rough-and-ready" allocation measure, from attack on the ground that it is not precise.

Petitioner seeks to predicate infirmity in the PMA plan on the way it has been disadvantaged by developments

[11] Practices at San Francisco Bay Area Terminals, 2 U.S.M.C. 588, 593, 595-96 (1941), aff'd California v. United States, 46 F. Supp. 474 (N.D.Sal. 1942), aff'd 320 U.S. 577 (1944). See also Investigation of Certain Storage Practices, 6 F.M.B. 301, 316 (1961); Storage Practices at Longview, Washington, 6 F.M.B.; California Stevedore & Ballast Co. v. Stockton Elevators, Inc., 8 F.M.B. 97 (1964).

subsequent to the original adoption of the PMA plan in January of 1961. In particular, petitioner complains of the interpretation that the tonnage basis of allocation should be based, not on the tonnage shown in the manifest as stated in the January, 1961 resolution, but on measurement tonnage in the case of automobiles. This ruling, announced in February, 1961, cannot be deemed unreasonable. Patently the manifest was not intended to be controlling in the sense of permitting a manifest to reduce assessments merely by referring to cargo on a weight basis, even though this had nothing whatever to do with the way ocean freight was determined—as is the case with petitioner which charters entire vessels. The record contains substantial evidence to show that PMA's January, 1961 resolution was to adopt a plan for allocating charges on the same revenue tonnage basis as had been used in PMA's dues. For general cargo and the bulk of commodities, revenue tons were measurement tons, except for certain bulk commodities manifested on dead weight tons. Treatment of automobiles as governed by measurement tons was merely the application of a 1958 ruling on PMA dues. That ruling in turn was based on industry practices in foreign trade and rejected efforts to report dues on weight basis by companies serving petitioner. Petitioner thereafter recognized and knowingly made reimbursement covering [fol. 774] the expenses of its stevedores in paying PMA dues on a measurement ton basis. The interpretation complained of is not unreasonable and it does not render the assessment system unreasonable.

Petitioner stresses that it will receive relatively little benefits under the union agreement as applied with PMA's assessments and that it will incur more than a 20% increase in discharge cost, tenfold the average increase for general cargo. The record made by petitioner is strong—though not as strong as petitioner puts it.[12]

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[12] (1) Thus it appears that Volkswagens are transported on liners (13,672 out of 42,598 units in 1962), and here the increase in discharge cost has been absorbed by the carrier.

(footnote continued on next page)

We cannot say, however, that the case is such as to require reversal of the order. As already noted, a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits.[13]

[fol. 775] In view of our ruling with respect to Section 17, it is apparent that there is no significant basis for the claim that petitioner is the victim of a discrimination that is unreasonable and hence unlawful under Section 16. Under the circumstances it is not necessary to consider whether and under what circumstances a rate practice that is purely "random" and *hence* inherently discriminatory may be challenged under Section 16 in the absence of a showing that competitive cargo has been preferred. *New York Freight Forwarders & Brokers Assoc.* v. *FMC*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

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(2) There is at least a question whether and to what extent the increase in stevedoring cost of private carriers may have been offset by decrease in cost of shipping by private carrier due to faster turn-around time.

(3) Another carrier of autos (Matson Transport) was enabled to make substantial saving in discharge cost. Thus automobiles in general may benefit more than petitioner in particular.

(4) The fund may have made it easier for MTC to eliminate a man on dockside.

[13] We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agreements not approved by the Commission are not protected from attack under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

[fol. 776]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840

VOLKSWAGENWERK AKTIENGESELLSCHAFT, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, Respondents,

PACIFIC MARITIME ASSOCIATION, MARINE TERMINALS CORPORATION, Intervenors.

On Petition to Review and Set Aside Order of the Federal Maritime Commission.

Before: McGowan, Tamm and Leventhal, Circuit Judges.

JUDGMENT—December 22, 1966

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the Federal Maritime Commission on review herein is affirmed.

Per Curiam

[File endorsement omitted]

[fol. 779] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 780]

SUPREME COURT OF THE UNITED STATES

No. 1168, October Term, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT, Petitioner,

v.

FEDERAL MARITIME COMMISSION, et al.

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1168~~ 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1966

No.

VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Volkswagenwerk Aktiengesellschaft, prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered December 22, 1966.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia (App. A, *infra*, pp. 1a-25a) and those of the Federal Maritime Commission (R. 6[illegible]a-728a)* are not yet reported.

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* "R." refers to the Joint Appendix printed for the court below.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra*, p. 26a) was entered on December 22, 1966. This Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

Questions Presented

1. Whether section 15 of the Shipping Act of 1916 (46 U.S.C., section 814), embracing "every agreement * * * providing for [a] * * * cooperative working arrangement" among covered persons, requires filing with the Federal Maritime Commission of an agreement by which one hundred twenty regulated enterprises acting under the domination of shipping lines, are exacting from cargo entering or leaving United States Pacific coast ports five million dollars annually through unequal assessments which impose a disproportionate burden upon petitioner's automobiles which travel predominantly on chartered vessels.

2. Whether charging Volkswagen vehicles ten times more per ton, and raising their discharge costs ten times more than that of other cargo not in competition with automobiles, for the same benefits relating to stevedoring and terminal handling, violates section 16 of the Shipping Act of 1916 (46 U.S.C., section 815), which prohibits common carriers and other regulated persons from subjecting anyone to "undue or unreasonable prejudice or disadvantage" and section 17 of the Act (*id.*, section 816) which demands the enforcement of "just and reasonable regulations and practices."

3. Whether, in any event, the decision below should be reversed because to sustain the agency's action the court resolved for itself factual and legal issues which the Commission, deeming them outside the case, had never reached or considered.

Statutes Involved

The relevant provisions of the Shipping Act of 1916, as amended, 46 U.S.C., sections 801 *et seq.*, follow:

Section 15, 46 U.S.C., section 814.

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
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Section 16, 46 U.S.C., section 815.

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>
> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, lo-

cality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * *

Section 17, 46 U.S.C., section 816.

* * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

5 U.S.C., section 706 reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case

PMA's Tonnage Tax. In 1960-1961, the Pacific Maritime Association ("PMA"), an association of employers of on-shore and off-shore maritime labor on the Pacific coast, and the International Longshoremen's and Warehousemen's Union ("Union" or "ILWU"), collective bargaining agent for the waterfront employees, took a most praiseworthy forward step. The Union agreed to permit the introduction of labor saving arrangements in return for the creation, over a period of five and a half years, of a "Mechanization and Modernization Fund" ("Mech Fund" or "Fund") of twenty-nine million dollars to be used to cushion the effects of higher productivity upon its members (R. 243a-344a, 618a-620a, 668a-669a, 685a-686a; App. A, 2a-3a). PMA successfully insisted, however, that the Union should have no voice regarding how this sum was to be raised (R. 210a-211a, 284a, 668a).

PMA has about one hundred and twenty members (R. 555a-587a). Among them are the respondents in the

Commission proceeding, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (collectively referred to as "MTC"), which discharge, and supply terminal facilities for, Volkswagen automobiles at San Francisco and Long Beach, California (R. 614a-616a, 667a, 682a-685a; App. A, 2a). Membership in PMA is open to carriers, stevedores and terminal operators, but not to shippers (R. 383a; App. A, 2a).

PMA decided to raise the monies for the Fund through a "tonnage tax" under which PMA collects a stipulated amount for each ton of cargo loaded or discharged on the Pacific coast by or for a PMA member (R. 466a-480a, 372a-377a, 588a-593a, 622a-625a, 668a-669a, 686a-692a; App. A, 3a-4a, 20a-21a). The exactions are unequal; some traffic is burdened more, some less. General cargo, including automobiles, pays five times as much per ton as does bulk cargo or scrap metal, and ten times the rate fixed on coastwise shipments of logs and lumber (R. 76a-79a, 348a-349a, 354a-355a, 366a, 490a-491a, 521a-522a, 624a-625a, 631a, 668a-669a, 690a-692a).* The result was a general cargo rate of 27½ cents a ton, a rate of 5½ cents per ton for bulk cargo and scrap metal, and a 2½ cent rate for logs and lumber in the coastwise trade (*ibid.*). The monies are paid to PMA by the on-shore members handling the cargo (R. 76a-77a, 367a-368a, 588a-593a).

The PMA-ILWU agreement provided that employers not belonging to PMA should "contribute to the Mechanization Fund at comparable rates and in a like fashion" (R. 284a, 631a-632a). PMA considered it "essential that

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* One of the first adjustments PMA made in its tax was to cut in half the assessments on coastwise shipments because this is "a very marginal business economically" (R. 490a, 366a). Subsequently, the levy on lumber moving in this trade was dropped still further to 2½ cents per ton (R. 348a-349a, 354a-355a). According to an internal PMA memorandum, the original assessment "would [have] put the coastwise lumber industry out of business" (R. 503a).

non-members be required to pay a similar assessment for competitive reasons" (R. 491a; see also R. 367a, 503a).

Petitioner is the German corporation which manufactures Volkswagen vehicles. Under the PMA plan automobiles are assessed on measurement tonnage (R. 625a-626a, 669a, 695a; App. A, 4a). Since Volkswagen vehicles average 8.7 tons, the PMA tax is about $2.35 per vehicle (R. 626a; App. A, 4a-5a). This represents almost twenty-five percent of their total cost of discharge—$10.45—prior to the PMA tax (R. 135a, 140a, 148a-149a, 175a-176a, 482a, 510a, 512a, 676a, 696a). By contrast the discharge cost of other general cargo is raised only about 2.2 percent (R. 149a-150a, 482a, 512a, 696a).

Direct labor costs reflect the same ten to one ratio. Before the PMA tax these costs averaged 49 cents per ton for Volkswagen vehicles (R. 167a-169a, 697a). PMA's assessment of 27½ cents per ton increases them fifty-six percent. By contrast, for all other cargo the Fund assessments represent only about five percent of direct labor costs (*ibid.*).

If the impact of the PMA tax upon Volkswagen automobiles is compared with the treatment accorded favored commodities, such as bulk cargo, scrap metal and coastwise lumber, which pay only one-fifth or one-tenth as much as general cargo, the ratio varies from fifty to one for the former to one hundred to one for the latter.

There was no likelihood that, due to the labor savings made possible by the Mech Fund, the cost of discharging Volkswagen automobiles would drop more than that of other cargo (R. 633a-634a, 670a-671a, 696a-697a; App. A, 24a-25a). As the Commission found, "stevedoring of cars has always been an efficient and economical operation, and testimony in the record shows that there is little likelihood of mechanical improvement in the method of unloading automobiles, and auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown" (R. 670a-671a).

PMA's Shipping Lines Refuse Relief. Since the tonnage by weight of Volkswagen vehicles is roughly one-tenth their measurement tonnage (R. 166a-167a, 626a), the burden upon Volkswagen automobiles could easily have been brought into line with that placed on other general cargo by predicating the PMA assessment on weight rather than measurement. Petitioner made every effort to secure some such adjustment (R. 481a-485a, 511a-514a, 519a-521a, 628a-629a; App. A, 4a-5a). All this accomplished, however, was a ruling by PMA that automobiles, uniquely, were always to be taxed upon their measurement tonnage, although all other cargo pays upon the basis of whatever tonnage, weight or measurement, is shown on the ship's manifest (R. 80a-86a, 102a-103a, 519a-520a, 524a-525a, 628a-630a, 669a-670a; App. A, 23a-24a).

The decision as to what petitioner's cargo should pay rested with the shipping lines which control PMA. Under PMA's by-laws these lines elect a majority of PMA's directors and control the vote at its membership meetings (R. 383a-389a, 525a-538a; App. A, 10a). Although the Mech Fund involved a labor cost of PMA's stevedoring and terminal operation members, all the members of both the PMA committee appointed to consider initially how this cost should be allocated and the committee subsequently formed to pass upon any resulting inequities represented shipping line interests (R. 75a-76a, 90a-92a, 538a-570a, 686a-687a; App. A, 10a).

Under PMA's plan, its carrier members ultimately foot the bill for the Fund assessment on cargo brought by them to this country (R. 367a-368a). If tax considerations had not interfered, they would have borne it directly (R. 77a, 367a-368a, 521a-523a, 588a-593a). On cargo sent by chartered vessel or non-PMA liners, however, the PMA onshore operator has to seek reimbursement from his nonmember customers (App. A, 5a). Over seventy percent of petitioner's cargo is carried by chartered vessel (R. 614a), and much of the remainder by non-PMA carriers

(R. 164a, 525a-538a, 632a). Consequently, the more Volkswagen automobiles pay towards the five million dollars needed annually, the less has to come out of the pockets of PMA's carrier members (see App. A, 10a-11a).*

MTC's Efforts to Collect the PMA Tax. MTC's profit on the discharge and terminal handling of each Volkswagen vehicle was one dollar or less (R. 145a). As a matter of practical economics, therefore, the PMA tax of about $2.35 per vehicle could not be absorbed, but by necessity had to be passed on to petitioner (R. 151a-153a, 241a-242a, 510a, 519a, 630a, 670a, 725a-726a; App. A, 5a).

When petitioner refused to pay, MTC wrote PMA on March 1, 1961, asking for advice on "what stand we can take in demanding payment of this assessment" and reporting that it had informed petitioner's representatives that MTC was "considered only a collection agency in this matter" (R. 486a-487a; App. A, 5a). In December 1961 PMA's directors took up "the problem of collecting funds from Volkswagen due the Mechanization Fund" and granted MTC's request for "legal and moral support" and authority "to bring suit against Volkswagen for the monies due" (R. 356a; App, A, 5a).

But when litigation finally started it took the form of a suit by PMA against MTC and its other on-shore members engaged in discharging Volkswagen automobiles for the unpaid assessments (R. 18a-24a). MTC impleaded petitioner (R. 28a-30a), which secured a stay pending determination by the Federal Maritime Commission whether

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* PMA's shipping lines vote the way their self-interest dictates. This is not denied but insisted upon by the organization's own counsel:

> "PMA members, like members of similar organizations, are not altruistic. It is probable that each member of PMA will exercise its voting power in its self-interest and will seek to persuade other members to its views whether or not they have the same interest." (Brief of PMA to Examiner, p. 11).

the Shipping Act had been violated (R. 613a-614a; App. A, 5a-6a).

The Proceedings Below. Petitioner filed a complaint with the Commission, naming MTC as respondents and challenging the legality under sections 15, 16 and 17 of the Shipping Act of the underlying agreements among the members of PMA and the acts taken by them in execution of these agreements (R. 12a-17a). PMA made itself a party to this proceeding by intervening (R. 43a-57a, 1a).

The examiner's initial decision was adverse to petitioner (R. 611a-656a; App. A, 8a). On exceptions, a majority of the Commission sustained the examiner (R. 666a-678a; App. A, 8a-10a), and dismissed the complaint (R. 729a). Commissioner Hearn disagreed with the majority and thought section 15 breached (R. 772a-728a). Commissioner Patterson strongly dissented on all points (R. 678a-722a). In a lengthy opinion, the Court of Appeals for the District of Columbia Circuit affirmed, indicating that, at least as to the section 15 issue, it was acting "with some hesitation" (App. A, 15a).

Reasons for Granting the Writ

The decisions below gut a major federal statute. They seriously impair the regulatory scheme created by Congress to control the monopoly powers permitted maritime cartels. They license the very abuses which Congress thought to end half a century ago when it enacted the Shipping Act: unfair discrimination and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination. H.R. Doc. No. 805, 63d Cong., 2d Sess., 417-421 (1914) ("Alexander Report").

Misunderstanding legislative history, the Federal Maritime Commission has refused to apply the Act as written and as interpreted until now by itself and by this Court. As construed by the Commission in this case, the Shipping Act permits a combination of common carriers and related

maritime enterprises to exercise unsupervised quasi-governmental taxing powers in relation to the waterfront. This in the face of the Act's requirement that there be filed with the Commission for approval "every agreement" among covered persons "providing for [a] * * * cooperative working arrangement." That this private levy exacts, for identical benefits, ten times, or even one hundred times, as much from automobiles as from other cargo is held not to contravene the Act's prohibitions against discriminatory charges and unreasonable practices. Great uncertainty, putting in doubt the legal status of hundreds of agreements, has been created regarding important questions of federal law affecting the entire maritime industry. Dissipation of such confusion in this important area is imperative.

Moreover, the failure of the court below to respect its judicial responsibilities and limitations calls for the exercise of this Court's supervisory power. In deferring reluctantly to the agency's construction of section 15, the Court of Appeals abdicated its judicial responsibilities. On the other hand, when it sustained the agency's decision with respect to sections 16 and 17 on new grounds and findings, it invaded the administrative area.

I

How section 15 of the Shipping Act should be construed raises an important question of federal law which has not been, but should be, settled by this Court.

Section 15 of the Shipping Act was intended to bring under governmental supervision all collective action by steamship lines and related maritime enterprises.

Early in this century, an exhaustive investigation by the House Merchant Marine and Fisheries Committee of the maritime industry, summarized in the Alexander Report, disclosed that:

> "[S]teamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. * * * They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control." H. R. Doc. No. 805, 63d Cong., 2d Sess., 418 (1914).

Exporters and importers filed complaints with the Committee, objecting, among other things, to excessive rates, discrimination among shippers in rates and cargo space and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination (*id.*, p. 417).

The Committee "concluded that the conference system had produced substantial evils and that it should not be permitted to continue without governmental supervision." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218-219 (1966). The Shipping Act followed. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 490 (1958).

The Act's key section, section 15, requires the filing for agency scrutiny of "every agreement" among covered persons falling into any one of seven categories. Included are agreements "fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing or destroying competition; * * * or in any manner providing for an exclusive, preferential or cooperative working arrangement " (46 U.S.C., section 814).

A. The Commission's Refusal to Give the Statutory Language its Plain Meaning Frustrates the Legislative Intent.

Conceding that the "literal language of section 15 is broad enough to encompass any 'cooperative working arrangement' " among covered persons, the examiner and the Commission, nevertheless, put PMA's levy outside the scope of that provision (R. 639a-640a, 643a-650a, 673a-676a). According to a majority of the Commission:

> "[T]he legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 674a, 725a).

In the view of three members of the Commission, the PMA arrangement does not meet this test because of the absence of "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675a). But the majority's restrictive reading cannot be reconciled with the statutory scheme nor with prior interpretations.

First, section 15 is not confined to agreements between persons in competition with one another. On the contrary, "every common carrier by water, or other person" is required to file a copy of "every agreement with another such carrier or other person." A freight forwarder does not vie for business with a carrier, yet "agreements or understandings * * * *between forwarders and carriers* may be discriminatory in such a way as to violate the provisions of § 15." *United States* v. *American Union Transp., Inc.*, 327 U.S. 437, 447 (1946) (emphasis supplied). Similarly, it could scarcely be maintained that a lessor of terminal facilities as such is in competition with his lessee, but such a lease may nonetheless be subject to section 15. *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959), *aff'd sub. nom., Greater Baton Rouge Port Comm'n* v. *United States*, 287 F.2d 86 (5th Cir. 1961), *cert. denied*, 368 U.S. 985 (1962).

Second, if Congress only intended to cover agreements affecting competition, why, in addition to agreements "controlling, regulating, preventing or destroying com-

petition" did it carefully enumerate and define six other categories of agreements to be filed?

Third, if only shippers and travellers are protected, why is the Commission directed to condemn agreements found to be "unjustly discriminatory or unfair as between carriers * * * or ports"?

Looking to the plain meaning of the words Congress employed in section 15, PMA's plan is squarely covered. Not only is it a "cooperative working arrangement" among persons subject to the Act—as was acknowledged by the court below, all members of the Commission and the examiner—but, it is one "fixing or regulating transportation rates or fares" and "controlling, regulating, preventing or destroying competition."

By establishing a uniform and artificial cost which must be recouped from the customers of the participants, the plan fixes rates, as Commissioner Patterson pointed out in his illuminating dissent:

> "The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to pre-existing rates for terminal facilities. Respondents [MTC] had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure." (R. 709a).

PMA's tonnage tax also affects competition. PMA's on-shore members by committing themselves to pay PMA approximately $2.35 for every vehicle they handled, curbed their ability to compete by lowering their prices.

Indeed, wages always affect prices. However, labor's special standing may immunize such effect from the antitrust laws, if it is a legitimate consequence of a collective bargaining agreement requiring labor to be paid in propor-

tion to use. But wholly different considerations apply if employers, acting in concert by agreement, artificially allocate a common labor cost to specific commodities, discriminating against outsiders and subsidizing their own businesses. To quote Commissioner Patterson again:

> "If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control" (R. 710a).

Creation of an unavoidable artificial cost element is a far more effective price-fixing device, *pro tanto*, than a mere exchange of promises regarding future prices.

Only because the Commission erroneously thought the terms of an agreement, rather than its practical and economic consequences to be critical, was it able to conclude that PMA's levy did not affect competition. It searched for proof of an explicit contractual commitment among PMA's on-shore members to pass the agreed upon assessments on to their customers and found none (R. 675a-676a) because the underlying economic necessities made such commitment superfluous. But where anti-competitive arrangements are involved, as this Court has observed in comparable contexts:

> "[J]udicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition. * * * [W]hether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

See also *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

Under the Commission's view of when an agreement is anti-competitive, the Shipping Act places no inhibitions on PMA's power. If automobiles, which provide little revenue for PMA's carrier members, can be assessed one hundred times as much, proportionately, as coastwise lumber, PMA, by raising the assessment high enough could stop the shipment of all automobiles to the Pacific coast (R. 212a). PMA's cooperative working arrangement enables a private group to regulate business through a quasi-governmental levy, burdening, and therefore discouraging, competitive transportation, such as the carriage of Volkswagen vehicles by chartered vessels, and subsidizing the group's own enterprises, like coastwise shipping.

But even if the PMA plan had no impact upon competition, as a "cooperative working arrangement" among covered persons, it would be within section 15. The very legislative materials cited by the Commission (R. 674a), the Alexander Report and the 1961 hearings on amendments to the Shipping Act, establish that Congress intended all agreements described in section 15 to pass governmental scrutiny whatever their actual competitive effect.

In 1961, the House Merchant Marine and Fisheries Committee considered amending section 15 to give the Commission's predecessor power to "exempt [an] agreement or a category of agreements" upon finding that it "does not limit or restrict competition between the parties thereto or between such parties and others." S. Doc. No. 100, 87th Cong., 2d Sess., 27, 73 (1962).

After the Assistant Attorney General in charge of the Antitrust Division opposed the amendment on the ground "that all agreements described in section 15 can be presumed to limit or restrict competition or they would not

have been included in the language of the section'"* the proposal was abandoned. *Id.* at 28.

With full awareness of the fact that not all the agreements described in section 15 were necessarily anti-competitive, Congress refused to permit any exceptions. What the Commissioner is doing here is arrogating the power to exempt agreements from the requirements of section 15—a power which Congress deliberately denied to it. The legislative intent found exact expression in the all-inclusive language Congress adopted after exhaustive study in 1916 and which it reenacted without modification in 1961 after equally thorough study and consideration. H. R. Doc. No. 805, 63d Cong., 2d Sess., (1914); 75 Stat. 763 (1961); S. Doc. No. 100, 87th Cong., 2d Sess., v (1962); H.R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962). That intent can be realized only by according its plain meaning to the language which Congress "selected as a matter of deliberate choice." *Carnation Co. v. Pacific Westbound Conference, supra,* 383 U.S. 213, 220 (1966).

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* *Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries,* 87th Cong., 1st Sess., 428 (1961). This is the testimony which the Commission cites in support of its refusal to read the language of the statute as written (R. 674a).

The following year, the Antitrust Subcommittee of the House Judiciary Committee, which conducted an exhaustive investigation of the administration of the Shipping Act, categorically rejected a request by the Commission's predecessor for clarification of section 15. H.R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962). Speaking of this predecessor, the Subcommittee said (at 359-360):

> "For a period of almost 45 years, lethargy and indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts."

B. The Court Below Should Not Have Deferred to an Erroneous Administrative Construction Predicated on Conventional Judicial Grounds.

On petition to review, the agency's construction of section 15 as excluding agreements which do not affect competition was accepted, *per curiam*, by the Court of Appeals, "albeit with some hesitation," in "deference to the expertise of the Commission" as a "tenable one and not arbitrary or capricious" (App. A, 15a-16a).

The Commission enjoys relative freedom from judicial interference in the fashioning of discretionary relief. *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607 (1966). But this does not, as the court below concluded, insulate from critical examination the Commission's disposition of an issue of statutory construction which is peculiarly within the judicial competence and which the agency made plain it decided by application of the standards employed by the courts rather than in reliance on considerations within its special province. *Cf. Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960). The Administrative Procedure Act preserves the power of the courts to reject agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C., section 706(2).

All that the Commission invoked in support of its construction were traditional tests of a purely legal nature: the Act's legislative history and a decision construing a provision of the Interstate Commerce Act (R. 674a-675a).*

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* *Kennedy* v. *Long Island R.R.*, 211 F. Supp. 478, 489 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963). There, a railroad strike insurance plan was held not to be an agreement providing "for the pooling or division of traffic, or of service, or of gross or net earnings or of any portion thereof" and therefore not to require the approval of the Interstate Commerce

Since the Commission consists of laymen as well as lawyers, the court below was far better equipped by training and experience than the agency to give these matters their proper value. Neither the "substantial evidence" rule nor related inhibitions on judicial interference with agency action with regard to a specific record or factual situation had any part to play. Only such weight should have been given the Commission's construction as was appropriate having regard to "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 499-500 (1958); *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 290-292 (1965); *Federal Trade Comm'n* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965); *Milk Transp., Inc.* v. *Interstate Commerce Comm'n,* 190 F. Supp. 350, 354-355 (D. Minn. 1960), *aff'd,* 368 U.S. 5 (1961).

Commission under section 5(1) of the Interstate Commerce Act, 49 U.S.C., section 5(1). It is self-evident that deliberately different statutory language was being interpreted. In fact, the Second Circuit specifically pointed to the difference in language in distinguishing the opposite results reached under the Federal Aviation Act (49 U.S.C., section 1382) which, like the Shipping Act, requires approval of any "cooperative working arrangements" (319 F.2d at 374 n. 11). The Interstate Commerce Act, unlike the Federal Aviation Act and the Shipping Act, originally gave the Interstate Commerce Commission no authority to exempt agreements from the antitrust laws. Such authority was first conferred in 1948 (62 Stat. 472, 49 U.S.C., section 5b), but was not involved in the case before the Second Circuit.

C. Hundreds of Agreements Are Affected By The Present Uncertainty Regarding the Questions of Federal Law Here Involved.

Of the over seven hundred current agreements among carriers on file in June 1966, eighty are described in the Commission's annual report as "miscellaneous cooperative working arrangements." * In the future such an agreement need be filed only if it explicitly regulates competition for the business of the shipping and travelling public. Neither the shippers the Act was designed to protect, nor the carriers it was to control, can now be certain which agreements are subject to governmental surveillance, and must be filed and approved before being put into execution, and which need not. Just as Congress apprehended, many anti-competitive arrangements will now escape governmental scrutiny. In fact, the court below, acquiescing in the Commission's exclusion of PMA's arrangement from section 15, treats as outside the case "petitioner's claim that it is the target of a combination in restraint of trade" (App. A, 25a n.13).

In addition, the unsettling effects of the Commission's erroneous construction of section 15 may affect other regulatory legislation, in particular, section 412 of the Federal Aviation Act (49 U.S.C., section 1382), which is modeled on the earlier statute and like it applies to any "cooperative working arrangements." Until now the Civil Aeronautics Board has assumed jurisdiction over any agreements meeting this description and fairly comparable to the one involved in this litigation. *Cf. Airlines Negotiating Conference Agreements,* 8 C.A.B. 354 (1947); *Six-Carrier Mutual Aid Pact,* 29 C.A.B. 168 (1959).

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* F.M.C. Fifth Annual Report, 9 (1966). In 1965-1966 alone about one thousand agreements were filed under section 15. (*Id.* at 9, 18, 20, 21.) If, in reliance upon the Commission's interpretation, agreements are withheld from filing, remedial legislation may prove necessary should such reliance prove to have been misplaced. See, 78 Stat. 148 (1964); H.R. Rep. No. 1126, 88th Cong., 2d Sess. (1964).

Disruption of the Shipping Act's regulatory scheme and repercussions in related fields can be avoided only by prompt correction of the erroneous view taken below regarding important questions of federal law.

II

The construction placed below on sections 16 and 17 of the Shipping Act is in conflict with decisions of this Court.

Two sections of the Shipping Act deal with the specific abuses disclosed in the Alexander Report: unjust discrimination against individual shippers at the whim of the powerful shipping combines. Section 16 makes it unlawful for any covered person "either alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 46 U.S.C., section 815. Section 17 requires every such person to "establish, observe and enforce just and reasonable regulations and practices." 46 U.S.C., section 816.

For the same benefits all cargo receives from the Mech Fund, that is, the opportunity to effect labor savings, automobiles are charged from ten to one hundred times as much. Such a differential in the rate "charged for identical services and facilities" is "prima facie discriminatory." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303 (1937).

To find no violation of law in these circumstances the decisions below hold that the statute does not mandate equality. It is enough that "substantial benefits" are present; that other persons, identically situated, are paying less for the same benefits is not unjust or unreasonable. Although the Commission found that there was "little likelihood of mechanical improvement in the method of unloading automobiles" and that "auto shippers will probably re-

ceive only general benefits from the fund plan," it held that there was no infraction of section 17 (R. 677a).

> "[T]here is no statutory requirement that all users of a facility be assessed equally. As long as 'substantial benefits' are provided for one against whom a charge is levied, we will not normally declare the charge unlawful."

The court below not only accepts this construction, but the logic of its opinion extends it to section 16 as well. (App. A. 22a-23a, 25a).

If some people can lawfully be charged more and other people less for the same services, what is prejudice? Or disadvantage? Or reasonableness? What does the statute proscribe, if anything? Only outright larceny, an exaction for which nothing is given in exchange, would seem to be banned.

Not only is such an interpretation of sections 16 and 17 inconsistent with the general understanding of the meaning of the statutory language when they were enacted, but it is in conflict with *California* v. *United States*, 320 U.S. 577 (1944). In that case the Commission's predecessor found that San Francisco terminals were violating sections 16 and 17 of the Act by, *inter alia*, not recovering their costs in the charges they made for wharf storage and other services. What difference should it have made there that, if wharf storage failed to supply "revenue sufficient to meet the cost of the service, the burden would be shifted to those who paid appellants for other terminal services, such as docking of vessels, loading and unloading, and transportation privileges over and through the terminals"? 320 U.S. at 581-582. Presumably, those paying for the "docking of vessels" and the other services mentioned were receiving "substantial benefits" in return. If nothing more were required to exclude application of sections 16 and 17 no significance would attach to the fact that they might have been overcharged for such benefits. Or, if benefits need not be related to burdens, why the elaborate attention

paid to cost accounting in *Terminal Rate Structure-Pacific Northwest Ports*, 5 F.M.B. 53 (1956)?

According to the Commission, only malice, a "design deliberately to burden," will bring section 17 into play (R. 677a):

> "An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another" (*Ibid.*).

Concededly, MTC had no such discriminatory intent and the Commission did not examine what motivated PMA nor how PMA's decisions had been affected by petitioner's employment of chartered vessels competing with PMA's dominating liner members.

Nothing in the language of the statute or its past interpretation makes improper motivation an essential element of an "unjust or unreasonable practice." Construing parallel legislation designed to destroy discrimination in land carriage, this Court has held undue preference or discrimination not to be precluded by the absence of "favoritism or malice." *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523-524 (1924); *Interstate Commerce Comm'n* v. *Chicago Great Western Ry.*, 209 U.S. 108, 122-123 (1908). The Shipping Act, intended by Congress insofar as similar terms are employed to have "like interpretation, application and effect," should receive the same construction. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 480-481 (1932).

By reading sections 16 and 17 as permitting enormous disparities in the charges made under identical conditions for identical services, the decisions below, unless reviewed and reversed, will frustrate the legislative purpose to ensure individual shippers the right to carry on their activities on an equal basis.

III

The improper invasion of the administrative area by the court below calls for the exercise of this Court's supervisory power.

It is black letter law "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

These principles were entirely disregarded by the Court of Appeals. To it, petitioner had argued that the agency had erred in applying section 17 solely to MTC's actions in trying to pass on the PMA assessments to petitioner (R. 653a-655a, 676a-678a, 722a-723a; App. A, 13a). The examiner had explicitly refused to review "the justness or unjustness, reasonability or unreasonability of the actions of PMA, or the aims and purposes" of the agreement "between and among PMA members" (R. 653a). He, and the Commission, had stopped with holding that it was not unreasonable for MTC to pass on to petitioner the amount which MTC were obligated to pay PMA on petitioner's cargo (R. 653a-655a, 676a-678a, 717a-722a).

The court's opinion reflects its agreement with petitioner:

> "We reject at the outset of our discussion of section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC

> and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment" (App. A, 18a n.8).

But since neither the examiner nor the majority in the Commission had deemed "the method of computing the assessment" to be covered by section 17, neither had considered how consistent the PMA plan in its entirety was with the requirements of section 17 nor made ultimate findings or reached any conclusions with regard thereto. These deficiencies the court proceeded to cure itself. Reviewing the evidence before the Commission, the court determined that PMA had not acted unreasonably:

> "Our examination of the PMA Committee report and the reasoning supporting its conclusions leads us to conclude that the assessment was reasonable" (App A, 20a). *

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* Parenthetically, none of the court's reasons for finding PMA's actions reasonable (App. A, 20a-22a) will bear close examination.

That PMA considered and rejected other alternatives—one of the three points considered by the Court of Appeals in its scrutiny of the reasonableness of PMA's action—proves nothing regarding the justness of the plan it did adopt. Similarly, even if we assume that administrative convenience alone will justify discrimination—this was the second point made by the court below—how does such convenience explain PMA's action? Administrative convenience would have been equally well served by a tax on Volkswagen automobiles based on weight as by one using measurement, which would have equalized the burden as between automobiles and other general cargo. Where it suited PMA to adjust the tax as in the case of coastwise lumber, administrative inconvenience posed no impediment.

Similarly, that PMA had in the past distributed certain costs in a similar fashion—the third and last point considered in the opinion—is meaningless unless all the facts are known regarding the earlier action. Conceivably, this may have been a reasonable method of allocating the particular costs involved in the prior allocation; on the other hand, it too might have been discriminatory. Discrimination gains no sanctity by repetition. As for the tax decisions relied on by the court, these are entirely inapposite since public taxing bodies do not operate under the restrictions Congress has deliberately placed upon the power exercised by private cartels in the shipping industry.

This conclusion permitted the court to find that there was likewise "no significant basis" for petitioner's section 16 claim (*id.*, 25a). Accordingly, it did not pass on petitioner's point that the Commission had erred in ruling that section applicable only where competitive cargo was preferred. In fact, no competitive relationship is necessary where shippers are charged "disguised markups of widely varying amounts" on "substantially identical services" and "for no apparent reason." *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 910, 914 (1965); *Investigation of Free Time Practices-Port of San Diego*, F.M.C. No. 1217, pp. 25-29 (May 25, 1966).

Thus, although the court sustained the results reached by the Commission under sections 16 and 17, it did so on the basis of facts found by it alone, not the Commission, and on grounds entirely different from those relied on by that agency.

And, what is most disturbing, the court arrived at results regarding the PMA assessment directly contrary to those which the Commission might well have reached. The court treated as irrelevant what the agency considered of paramount importance. Bad as the Commission's interpretation of section 17 is, it has at least the merit of recognizing that otherwise unexceptionable practices may violate the Act if maliciously motivated. But the Court of Appeals, in clearing PMA's assessment of illegality, held PMA's intent to be outside the case.

> "We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding" (App A, 25a n.13).

The judicial function was temporarily exhausted when the court concluded the issue of the reasonableness of the method of computing the PMA assessment to be present. Proper respect for the balance between the executive and the judiciary dictated that the matter be remanded to the Commission to give it an opportunity to consider this issue, to make its ruling and to state the reasons for its action. *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); *Interstate Commerce Comm'n* v. *J. T. Transport Co.*, 368 U.S. 31, 93 (1961).

Review of administrative action falls more often to the court below than to any other tribunal. Its invasion of the administrative function should not be permitted to go uncorrected.

Conclusion

The number of people and the amount of money directly involved in the assessments challenged here would alone justify the attention of this Court. Every ton of cargo entering or leaving the Pacific coast is affected by the PMA tax. The total levy annually is about five million dollars a year. To date approximately thirty million dollars has been collected; on petitioner's cargo alone about half a million dollars is owing.

PMA's annual toll can be expected to continue. Already the terminal date originally fixed has been changed to permit enlargement of the Mech Fund. Furthermore, what the Pacific coast is doing may well be copied elsewhere, including the Eastern seaboard.

But far overshadowing these considerations, important as they are, is the effect of the decision below on the administration of the Shipping Act, the cornerstone of American maritime policy. That Act "rests on the assumption that the prosperity of our foreign commerce and

the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 381 (1962). All these objectives are now jeopardized.

For these reasons it is respectfully requested that the Court grant this petition for a writ of certiorari.

Dated: March, 1967.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, RESPONDENTS

PACIFIC MARITIME ASSOCIATION,
MARINE TERMINALS CORPORATION, INTERVENORS

On Petition to Review and Set Aside Order of the Federal Maritime Commission

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Decided December 22, 1966

Mr. Walter Herzfeld, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Richard A. Whiting* and *Robert J. Corber* were on the brief, for petitioner.

Mr. Walter H. Mayo, III, Attorney, Federal Maritime Commission, with whom *Assistant Attorney General Turner, Messrs. James L. Pimper*, General Counsel, *Robert N. Katz, Solicitor*, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents.

Opinion of United States Court of Appeals for the District of Columbia Circuit

Mr. Gary J. Torre, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Mr. Edward D. Ransom* was on the brief, for intervenor, Pacific Maritime Association.

Mr. Arthur R. Albrecht entered an appearance for intervenor, Marine Terminals Corporation.

Before McGowan, Tamm and Leventhal, *Circuit Judges.*

Per Curiam: This case is before this court on a petition to review and set aside an order of the Federal Maritime Commission. Petitioner is a German corporation which manufactures Volkswagen automobiles. It ships large quantities of automobiles to ports on the Pacific Coast by means of common carrier and chartered vessels. Marine Terminals Corporation [hereinafter MTC], respondent below, intervenor here, operates ocean terminals at San Franciso and Long Beach, California, where it provides stevedoring services for both common carriers and charter vessels. Pacific Maritime Association [hereinafter PMA], intervenor below and before this court, is a nonprofit corporation made up of common and contract carriers, marine terminal operators, and stevedore contractors. PMA was organized in 1949 for the purpose of negotiating and administering labor contracts with labor unions on behalf of its members. MTC is a member of PMA; Volkswagen is not, since shippers are not eligible for membership in the organization.

I.

In order to understand the present controversy between the parties, it is necessary to review briefly the origins of their dispute. As noted, PMA serves as the collective

bargaining representative for its members. In 1957 the members desired to introduce work-saving devices into the industry and to be free of strikes and slowdowns during the period of transformation to greater mechanization. In its capacity as the representative of longshoremen and marine clerks, the International Longshoremen's and Warehousemen's Union [hereinafter ILWU] desired assurances from PMA that its members would share in the monetary benefits realized from the introduction of work-saving devices.

As a result of extensive negotiations between PMA and ILWU, a "Mechanization and Modernization Fund" of $29,000,000 was agreed upon. This fund was to be collected over a nearly six-year period from PMA members and to be used to cushion the effects of higher production upon longshoremen and marine clerks displaced by the mechanization. Since PMA's membership was responsible for payment of the fund, the ILWU agreed to allow PMA to be sole determinator as to how the fund should be accumulated. The necessity for the fund itself is not here in controversy; in fact, all parties agree that it serves a salutary purpose. What is in controversy is the funding method approved by PMA to raise the money from its members.

In order to determine how its members should be assessed in accumulating the fund, a Work Improvement Fund Committee was appointed by PMA. The majority of the Committee recommended that members should be assessed on the basis of tonnage carried or handled, with bulk cargo being assessed one-fifth the rate of general cargo.[1] The rate for general cargo was set at 27½¢ per ton carried or handled; the special category of bulk cargo was to be assessed at 5½¢ per ton carried or handled.

[1] In adopting the majority report, a minority report recommending that a combined man-hours—tonnage method of assessment should be used was rejected.

Each member of PMA was to remit to PMA, as trustee for the fund, an amount equal to the per tonnage assessment, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement.

The Committee recommended that the assessment be based on the cargo "as manifested" for loading or discharging at Pacific Coast ports. Usually any particular type of cargo is manifested, consistently, either on a weight or measurement basis. Thus the amount of the assessment for any particular commodity would be directly related to whether that commodity was manifested by weight or measurement tons.

There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown (the unit price including costs, overhead and profit to the terminal operator, as well as an assessment for PMA dues.) On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight.

Despite the fact that automobiles were manifested in these different ways, PMA determined that automobiles should always be assessed for the mechanization fund on a measurement ton basis regardless of how they were manifested. This treatment of automobiles was in contradistinction to all other cargo which was assessed according to the manner in which it was manifested.

II.

Cast against this background, Volkswagen's grievance comes into sharper focus. If considered on a measurement ton basis, a Volkswagen automobile measures 8.7 tons, whereas if a weight ton basis is utilized, it measures only 0.9 tons. An assessment for the fund based on

measurement tons at 27½¢ per ton equals $2.35 per automobile; the same assessment based on weight tons equals $.25. Thus the utilization of the measurement ton as the standard results in an assessment more than ten times greater than if the weight ton were to be used.

Volkswagen promptly protested to PMA the "discriminatory burden" imposed upon automobiles in general and Volkswagens in particular. Since this make of automobile constitutes by far the largest number of automobiles imported through Pacific Coast ports, the "ten times heavier tax," it argued, was in fact an excessive tax on Volkswagens. In addition, Volkswagen protested favorable treatment accorded by PMA to scrap metal and lumber cargo which were relieved of paying a major part of the assessment by virtue of "depressed" conditions in these industries. Petitioner also argued that the "tax" was particularly inequitable as applied to its operations since, because of previous modernization made in the handling of automobiles, no substantial savings could be expected in the handling of Volkswagens as a result of the institution of the mechanization fund. Petitioner's arguments to PMA were to no avail; Volkswagen has, however, refused to pay the assessment as calculated on a measurement ton basis.

Volkswagen's refusal to pay the assessments on its automobiles prevented the terminal operators (and particularly MTC) from paying to the PMA fund the assessments due on this cargo. It was both theoretically and practically impossible for the terminal and stevedoring companies to absorb the 27½¢ per ton assessment on automobile cargo ($2.35 per auto) since their profit per automobile does not exceed $1.00. MTC sought advice from PMA as to what "stand we can take in demanding payment of the assessment." MTC requested PMA's Board of Directors for authority "to bring suit against Volkswagen for the monies due." Rather than have MTC

sue Volkswagen directly, however, it was determined by PMA that it would sue MTC and the other onshore operators engaged in discharging Volkswagen automobiles and they would in turn implead Volkswagen. PMA did bring suit against MTC in the United States District Court for the Northern District of California; when Volkswagen was impleaded by MTC, the District Court stayed the proceedings in that court at the request of Volkswagen to enable it to institute proceedings before the Federal Maritime Commission under the Shipping Act of 1916, amended, 46 U.S.C. § 801 *et seq.* (1961). The district court granted the stay and petitioner began these proceedings.

The following issues were submitted to the Commission for its determination:

> "1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15[2] of the Shipping Act, 1916, as

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[2] Section 15, 46 U. S. C., section 814.

* * *

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement"

amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815.[3]

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in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.

* * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

[3] Section 16, 46 U.S.C., section 815.

* * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

> 3. Whether the assessments claimed from [Volkswagen] constitutes an unjust and unreasonable practice in violation of Section 17 . . ."[4]

Subsequently hearings were held, and the Examiner issued his initial decision finding, *inter alia*, that MTC and PMA were persons subject to the Shipping Act and that the agreement entered into between MTC and other PMA members was a "cooperative working arrangement." The examiner went on to find, however, that the cooperative working arrangement between MTC and the other members of PMA was not such an arrangement required by Section 15 of the Shipping Act to be filed with and approved by the Federal Maritime Commission. The Examiner also found no violation of Section 16 or 17 of the Shipping Act.

Before the Commission, both MTC and PMA contested its jurisdiction, MTC arguing that they were not "other persons" under Section 1 of the Act[5] and PMA arguing that the exclusive jurisdiction given the National Labor Relations Board over collective bargaining precluded the Commission from having jurisdiction in the instant case.

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[4] Section 17, 46 U. S. C., section 816.

* * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[5] The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. § 801.

The Commission did not resolve the jurisdictional question, but rather assumed for the purposes of its decision that both MTC and PMA were subject to the Act. Even though it found the literal language of Section 15 broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Act, the majority of the Commission held Section 15 inapplicable to PMA's agreements regarding the mechanization fund because it interprets that section to apply

> "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives."

The agreement among the members of PMA, the Commission found, was not, standing alone, such an agreement that would affect competition by parties in vying to serve outsiders who are not parties to the agreement. In order to find a Section 15 agreement, the Commission held that there must be demonstrated that there was "an additional agreement among the PMA membership to pass on all or a part of its assessments to the carriers and shippers served by the terminal operators." The Commission determined, however, that the "record is devoid of evidence showing the existence of such an additional agreement."

The two dissenting Commissioners did not agree with the majority members on this point, arguing that Section 15 requires that the agreement in question should have been filed with the Commission.

The Commission further found that no violation of Section 16 existed because petitioner had failed to show that cargo competitive with its automobiles (id est, other automobiles) had been preferred. As for Section 17, the Commission, although noting that MTC conceded that "the

method of assessment against automobiles on a tonnage basis is unfair," found no "unreasonable practice" because "there is no statutory requirement that all users of a facility be assessed equally."

III.

Petitioner argues ably and earnestly before this court that the Commission has erred in approving the agreements involved in this case. It charges that PMA is dominated by liner interests and that the discriminatory "tax" on Volkswagen automobiles has been meted out to transfer to Volkswagen the financial burden which liner cargo should be carrying. It argues that the PMA committees set up to implement the funding of the mechanization fund are controlled by the shipping lines who are members of PMA and that the decision regarding how heavily automobiles should contribute to the fund always lay with these shipping lines.[6] Since over seventy per cent of Volkswagen's automobiles arrive by chartered vessel (non-PMA members) and many of the remainder are carried by liners not members of PMA, the higher automobile tax falls heaviest on Volkswagen and serves to lessen the amount of assessment on other general cargo carried by the shipping lines who are PMA members.

[6] It is interesting to note in this regard that under PMA's by-laws, its carrier membership have a majority on its Board of Directors and the controlling vote at membership meetings. In addition, carriers furnish all the members of both the PMA committee appointed to consider how the cost of the mechanization fund should be allocated and the committee subsequently formed to pass upon any inequities resulting from that method. Neither committee included any independent terminal operators or stevedoring contractors. The hearing examiner found "that there is no substantial evidence in the record to support Volkswagen's contention that liner interests dominate PMA."

Volkswagen charges that PMA is attempting to utilize automobile cargo, which the liner interests do not in the main carry, to subsidize other forms of cargo carried by the liner interests. Volkswagen further charges that on all cargo loaded or discharged on behalf of PMA's carrier members, the carrier member must bear the cost of the mechanization fund payments; however, on cargo arriving by chartered vessel (such as seventy per cent of Volkswagen), the burden of the tax falls upon the non-PMA member shipper (Volkswagen). Thus it is to the financial advantage of PMA liner members to place a disproportionately heavy assessment on automobiles.

With respect to the question of whether there was an agreement in this case under Section 15, petitioner argues that the collective action engaged in by the members of PMA as embodied in its agreements is exactly the type conduct which Congress intended to regulate when it passed the Shipping Act. It states that Section 15 requires the filing and approval of *every* agreement, by which is meant as well an "understanding," falling into one of seven categories enumerated in the Act. (See note 2, *supra.*) Included in these categories is any agreement

> "fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement."

Petitioner argues that, giving the statutory language its plain meaning and a reasonable interpretation, the PMA agreements clearly serve to bring about all of these proscribed consequences.

Petitioner also attacks the Commission's holding that a Section 15 agreement must be between parties in competition with one another and its further holding that the agreement must relate to a specific aspect of the compe-

tition between them, that is, competition with reference to the "shipping or travelling public, or other representatives." Such a reading of the Act is far too narrow, it argues, and all but emasculates the Act as an effective means of regulating congressionally proscribed conduct in the industry. Moreover, the Commission's interpretation serves to remove from the Act's jurisdiction agreements involving persons between whom no competition has ever existed as, for example, an ocean carrier and a freight forwarder, both of whom are subject to the Act.

Finally, petitioner argues with respect to Section 15 that, even if the Commission's construction of the statute were on sound ground, it would still have erred in concluding that such construction left the cooperative working arrangement outside Section 15. As the Commission made plain, it would have found such arrangement within the statute if there were

> "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators."

Petitioner attacks the Commission's characterization of the record as being "devoid of evidence" showing the existence of such an additional agreement. It points to the fact that, as a logical and practical matter, it necessarily had to be within the contemplation of the PMA terminal operator members and stevedoring companies that the assessment would be passed on to shippers because when MTC and the other PMA members voted the assessments they knew that they could not pay them without increasing their charges to petitioner. The assessments, it is argued, "were agreed to with this as a silent predicate. There was no need to secure explicit agreement regarding action to which there was no alternative." Petitioner further argues that all involved knew

that the passing on of the PMA assessment to Volkswagen was an integral part of PMA's program. Thus, when Volkswagen refused to reimburse MTC, PMA made no serious attempt to collect the assessments from MTC nor did it dispute MTC's description of itself as "only a collection agency" in the matter. Petitioner points further to the fact that MTC has never made any payments to PMA on cargo on which Volkswagen has refused to recognize any obligation to pay, although MTC has made all other payments called for by the cooperative working arrangement. This conduct, petitioner argues, demonstrates an "understanding" within the contemplation of Section 15 to pass on the assessments to petitioner.

Petitioner also attacks the Commission's determination that there was no Section 16 violation involved in this case because petitioner had failed to show that cargo in competition with its automobiles had been preferred. Petitioner argues that, although past precedents of the courts and Commission support a "competition" requirement, more recent cases have done away with such a requirement. It argues that the focus of the Commission should be on the fact that the assessment of automobiles based upon measurement tons coupled with favored treatment given other cargo serves to provide other cargo with a "preference and advantage" not granted petitioner, which is undue prejudice in clear violation of the Act.

With respect to Section 17, petitioner argues that the Commission erred in not finding an unreasonable and/or unjust practice by MTC in the execution of the PMA agreement. It faults the Commission for failing to look at the method for allocating the cost of the fund, and for failing to consider under Section 17 the making of the monthly payments to PMA by the terminal and stevedoring companies. It argues that the cooperative working arrangement among the membership of PMA is, in fact, illegal under the antitrust laws as a price fixing arrange-

ment and therefore necessarily unreasonable under Section 17 and that the arrangement is inequitable because it distributes a common cost in an unfair and unreasonable fashion. Finally, it attacks the Commission's determination that there need only be "substantial benefits" accruing to one against whom a charge is levied, and its decision that it is not necessary that benefits and burdens be directly related.

IV

Before deciding the questions proposed here, reference must be had to the principles which are to guide us in reviewing decisions of an administrative agency such as the Federal Maritime Commission. Our touchstone here has to be the Supreme Court's recent decision in *Consolo* v. *FMC*, 383 U.S. 607 (1966), where the Court, in the course of reversing a decision of this court, spoke at length concerning the meaning of the substantial evidence rule which appellate courts are to apply to decisions of the Federal Maritime Commission. In *Consolo*, the Court stated:

> "Section 10(e) of the Administrative Procedure Act . . . gives a reviewing court authority to 'set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . . Cf. *United States* v. *Interstate Commerce Comm'n*, 91 U.S.App.D.C. 178, 183-84, 198 F.2d 958, 963-64, *cert. denied*, 344 U.S. 893. We have defined 'substantial evidence' as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of the evidence,

> and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.
>
> Congress was very deliberative in adopting this standard of review. It frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps to promote the uniform application of a statute."

Although numerous statements and re-statements of the substantial evidence rule as interpreted and applied by federal appellate courts might also be cited, we believe that what was recently said by this court in *Philadelphia Television Co.* v. *FCC*, —— U.S.App.D.C. ——, —— F.2d —— (No. 19,577, March 28, 1966) has particular relevance with respect to the task confronting this court in reviewing the decision of the Commission in the instant case. There we said that

> "to sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceeding."

Deference must also be paid in this case to the Commission's expertise, especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.

Applying these general principles to the specific issues before us in this case, and giving due deference to the expertise of the Commission, we conclude (albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commission's decision. The Commission's conclusion that the funding agreement standing alone does not come within the pro-

visions of Section 15 is a tenable one and not arbitrary or capricious, especially in view of the paucity of dispositive precedent on the question.

The Commission's determination that the record is "devoid of evidence" showing the existence of an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators presents a closer question. Petitioner points to a number of factors which tend to demonstrate the existence of such an agreement.[7] In addition, petitioner points out that as a practical and logical matter MTC had no choice but to pass on the cost of the assessment to the shipper since it was compelled to do so by economic necessity. Since MTC and the other terminal operators and stevedore companies were members of PMA, and since the logical and necessary consequence of their agreement to make the assessment was that such assessments would have to be passed on to the shippers, it necessarily follows that there was at least a tacit agreement among the terminal operators and stevedore companies that the assessment would be

[7] This evidence includes: a telegram from one of the PMA members handling Volkswagens expressing the opinion that the cost could never be assumed by the stevedore companies; a letter from MTC to PMA advising that "there is no way that the contractor could absorb such an increase"; a letter from MTC to PMA in which MTC described itself as "only a collection agency in this matter"; a letter expressing PMA's fears that if Volkswagen received a new rate the Army would demand the same for the transport of its automobiles; an inter-office PMA memo stating that the funding committee did not feel that the then present assessment worked a hardship on the *shipper;* minutes of a PMA meeting expressing the opinion that the money owed was due from Volkswagen and not MTC; the creation of an escrow agreement for payments of funds *on behalf of Volkswagen* (payment to be made by the stevedores).

passed on to the shippers. Petitioner, however, is not able to point to any direct testimony establishing that such an agreement was made.

In the face of the evidence relied upon by petitioner and the forceful logic of its argument, the Commission held that

> "to hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement."

The question we must decide is whether the record considered as a whole contains substantial evidence to support the Commission's finding. It should be noted that what we are here concerned with presents essentially questions of fact—did the agreement take place, was there an "arrangement" between the parties, etc. Moreover, questions of credibility are involved since witnesses for PMA affirmatively denied the existence of any such agreement or arrangement, and the Examiner, who had an opportunity to observe the witnesses, found no agreement. In these circumstances, we believe that there is substantial evidence in the record considered as a whole to support the Commission's conclusion. Although we might be inclined to reach a conclusion different from that of the Commission were we considering the question *de novo*, or under a less restricted power of review than that enunciated in *Consolo, supra*, we are bound to give the Commission's decision the benefit of all reasonable inferences and our conclusion in so doing is that the Commission's determination that there was no additional agreement is supported by substantial evidence.

Turning next to Section 17,[8] careful consideration has been given by the court to petitioner's contention that the laying of the mechanization fund assessment on automobiles on a measurement basis rather than the weight basis used on the Volkswagen cargo as manifested is "an unreasonable practice . . . relating to . . . the handling of property" in violation of Section 17 of the Act.[9] The problems

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[8] Section 16 will be considered, *infra*, since our conclusions with respect to Section 17 have relevance in the resolution of petitioner's claim that it is a victim of discrimination in violation of Section 16. We reject at the outset of our discussion of Section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment.

[9] The Commission's opinion concerning this issue recognized the salient facts relied on by petitioner and disposed of the problem with reasoning discussed, *infra*. The Commission said:

> It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.
>
> However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Cooperage Co. Inc.* v. *Board of Commissioners*, 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a

of the case under Section 17 are perhaps most clearly focused by adverting to the opinion of the dissenting member of the Commission, who concluded that PMA's entire system of measurement and allocation of this type of labor cost is unjust and unreasonable. In his view the core injustice ensued when PMA adopted the recommendation of a majority of its committee, which recommended a property basis of allocation of the assessment (in accordance with tonnage), whereas only through a labor measure of allocation such as that recommended by the minority (*id est,* man-hours with adjustments for inequities) can the burden of this labor cost become a just cost of business. The property measure, he concluded, opens the door to a singling out of particular traffics or persons for disadvantage, and this, in turn, is possible because PMA's control of the market precludes corrective control by competitive forces.

The majority of the Commission was aware that a minority of PMA's committee recommended that the assessment be based in substantial part on the relative man-hours of the various stevedoring companies involved. Indeed, as the Examiner noted, the first $1,500,000.00 mechanization fund raised by PMA, during 1960, pending the report of the Committee, had been collected on a man-hour basis. However, PMA members complained that this method was unfair, and the majority of the Commission concurred in this conclusion.

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charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.

The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund [11] assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

Our examination of the PMA Committee report and the reasoning supporting its conclusions leads us to conclude that the assessment was reasonable. It appears that the Committee began by considering the possibility of apportioning the assessment on the basis of who obtained a savings as a result of now-permitted mechanization. An expert of the Bureau of Labor Statistics was engaged to explore the possibility of measuring productivity improvement. The PMA turned away from this approach, partly because it feared that its adoption would help the Union enlarge its later demands and partly because the system was unfeasible due to complexity, including the difficulty of determining which savings were attributable to this or other factors. The Committee felt it to be essential to arrive at a system that would not be excessively burdensome to anyone, yet would be simple in its administration.

In rejecting continuance of the initial man-hours basis,[10] the majority of the Committee reported:

> "They were struck by the inequity of a contribution formula based on man-hours which would provide for a decreasing percentage of the total contributions to the Fund by the operators which made greatest use of and received the greatest benefit from the new agreements, and were most contributing to the loss of work opportunity that gave impetus to the Union's demand for the fund and would be invoked in future bargaining as the ground for continuing the Fund."

The Committee was troubled by the inequity of most rewarding with low assessments those who had already mechanized most when it was their past reduction of work hours that had galvanized the Union into the activities that led to this industry-wide labor cost assessment.

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[10] The majority considered that the reasons against continuance of a man-hour basis also militated against partial reliance on this factor, as recommended by the majority.

The Committee recommended a formula based on cargo tonnage as a "rough-and-ready" way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It considered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.

The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop.

It may be noted that the Union had proposed that a tonnage formula be incorporated in the collective bargaining agreement, but the PMA did not wish to limit its discretion in seeking and determining the most reasonable formula it could devise. Petitioner could presumably have had no complaint if PMA had acquiesced in the Union's demand. The PMA told the Union it wanted flexibility to allocate the labor cost on the basis of tonnage man-hours or both, and the Union agreed to let PMA decide the matter. (PMA also feared a tonnage charge levied under a Union agreement would have a tendency to persist into the next contract.)

In view of the foregoing, we cannot say that PMA was unreasonable in arranging for an allocation of this industry labor cost in accordance with volume tonnage already in industry use for a portion of PMA's dues. Tonnage dues, based on revenue tons of cargo, had been used for many years by PMA. PMA's function and budget relate

primarily to the negotiation and administration of union labor contracts. There was therefore in effect an industry custom and practice for using revenue tonnage for the purpose of allocating sundry labor costs. The mechanization fund is an additional labor cost administered by PMA.

Petitioner complains of the inequitable "tax" laid upon it. This use of the word "tax" is forensic rather than analytical, but it calls to mind various decisions which if anything militate against its declaration of arbitrariness. "Administrative convenience and expense in the collection or measurement of the tax" is a valid ground of classification in arranging the incidence of taxation. *Southern Coal & Coke Co.* v. *Carmichael*, 301 U.S. 495, 511 (1937). There is no requirement that for every payment there must be an equal benefit. *Houck* v. *Little River Drainage Dist.*, 239 U.S. 254, 264-65 (1915).

The Commission's doctrine follows the same line. Thus in *Evans Cooperage, Inc.* v. *Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415 (1961), a city's uniform wharfage charge was upheld, even though applied to cargo transferred from a barge to a vessel moored at a wharf without moving across the wharf, on the ground that "substantial benefits" were provided for the person being charged. The Commission noted that the barge and cargo enjoyed substantial benefits from the services and facilities, that "there can be no precise equivalence between services and charges" and that the service was "reasonably related to the charges."

The Commission upheld the assessments before us, noting the substantial benefits accruing to all cargo from the mechanization agreement. As the Commission noted, this is not to say that the mere existence of substantial benefits permits a tax laid solely on one sub-class of the

persons benefited. The Commission would presumably agree that the mere existence of the substantial benefits would not immunize an unreasonable classification system or egregious discrimination.[11] It does serve, however, to protect a system, reasonable on its face, that uses a "rough-and-ready" allocation measure, from attack on the ground that it is not precise.

Petitioner seeks to predicate infirmity in the PMA plan on the way it has been disadvantaged by developments subsequent to the original adoption of the PMA plan in January of 1961. In particular, petitioner complains of the interpretation that the tonnage basis of allocation should be based, not on the tonnage shown in the manifest as stated in the January, 1961 resolution, but on measurement tonnage in the case of automobiles. This ruling, announced in February, 1961, cannot be deemed unreasonable. Patently the manifest was not intended to be controlling in the sense of permitting a manifest to reduce assessments merely by referring to cargo on a weight basis, even though this had nothing whatever to do with the way ocean freight was determined—as is the case with petitioner which charters entire vessels. The record contains substantial evidence to show that PMA's January, 1961 resolution was to adopt a plan for allocating charges on the same revenue tonnage basis as had been used in PMA's dues. For general cargo and the bulk of commodities, revenue tons were measurement tons, except for

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[11] Practices at San Francisco Bay Area Terminals, 2 U.S.M.C. 588, 593, 595-96 (1941), aff'd California v. United States, 46 F. Supp. 474 (N.D.Sal. 1942), aff'd 320 U.S. 577 (1944). See also Investigation of Certain Storage Practices, 6 F.M.B. 301, 316 (1961); Storage Practices at Longview, Washington, 6 F.M.B. 178 (1960); California Stevedore & Ballast Co. v. Stockton Elevators, Inc., 8 F.M.B. 97 (1964).

certain bulk commodities manifested on dead weight tons. Treatment of automobiles as governed by measurement tons was merely the application of a 1958 ruling on PMA dues. That ruling in turn was based on industry practices in foreign trade and rejected efforts to report dues on weight basis by companies serving petitioner. Petitioner thereafter recognized and knowingly made reimbursement covering the expenses of its stevedores in paying PMA dues on a measurement ton basis. The interpretation complained of is not unreasonable and it does not render the assessment system unreasonable.

Petitioner stresses that it will receive relatively little benefits under the union agreement as applied with PMA's assessments and that it will incur more than a 20% increase in discharge cost, tenfold the average increase for general cargo. The record made by petitioner is strong—though not as strong as petitioner puts it.[12]

We cannot say, however, that the case is such as to require reversal of the order. As already noted, a generally reasonable rule for assessing benefits may be main-

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[12] (1) Thus it appears that Volkswagens are transported on liners (13,672 out of 42,598 units in 1962), and here the increase in discharge cost has been absorbed by the carrier.

(2) There is at least a question whether and to what extent the increase in stevedoring cost of private carriers may have been offset by decrease in cost of shipping by private carrier due to faster turn-around time.

(3) Another carrier of autos (Matson Transport) was enabled to make substantial saving in discharge cost. Thus automobiles in general may benefit more than petitioner in particular.

(4) The fund may have made it easier for MTC to eliminate a man on dockside.

tained though it produces some instances of burdens wholly disproportionate to benefits.[18]

In view of our ruling with respect to Section 17, it is apparent that there is no significant basis for the claim that petitioner is the victim of a discrimination that is unreasonable and hence unlawful under Section 16. Under the circumstances it is not necessary to consider whether and under what circumstances a rate practice that is purely "random" and *hence* inherently discriminatory may be challenged under Section 16 in the absence of a showing that competitive cargo has been preferred, *New York Freight Forwarders & Brokers Assoc.* v. *FMC*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 308 U.S. 914 (1965).

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[18] We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agreements not approved by the Commission are not protected from attack under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840 September Term, 1966.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, RESPONDENTS

PACIFIC MARITIME ASSOCIATION,
MARINE TERMINALS CORPORATION, INTERVENORS

On Petition to Review and Set Aside Order of the Federal Maritime Commission.

Before: McGOWAN, TAMM and LEVENTHAL, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Maritime Commission on review herein is affirmed.

Dated: December 22, 1966

PER CURIAM

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 22, 1966

NATHAN J. PAULSON
Clerk

SUPREME COURT, U. S.

No. 1168

APR 17 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1168

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Intervenors in Opposition

I.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia, announced on December 22, 1966, is reported at 371 F. 2d 747 (D.C. Cir. 1966). The opinion of the

Federal Maritime Commission is not yet reported but is reprinted at R. 666a-728a.[1]

II.

QUESTIONS PRESENTED

The petition for certiorari seeks to present questions arising under sections 15, 16, and 17 of the Shipping Act, 1916. (46 U.S.C. §§ 814, 815, 816.) The only question presented, however, is whether the court of appeals acted in accordance with the decisions of this Court by limiting the scope of its review of the Maritime Commission's determinations to whether such determinations had a reasonable basis in law and were supported by substantial evidence.

III.

STATEMENT OF THE CASE

Intervenor Pacific Maritime Association (PMA) is a non-profit corporation whose members are the carriers, marine terminal operators and stevedore contractors comprising the Pacific Coast shipping industry. PMA bargains collectively on behalf of its members with the unions representing the offshore and shoreside employees of its members. It is also responsible for the administration and implementation on behalf of its members of the collective agreements negotiated with the various maritime unions. (R. 616a, 667a.)

The International Longshoremen's and Warehousemen's Union (ILWU) is the certified collective bargaining agent of all longshoremen and marine clerks employed on the Pacific Coast. It bargains collectively with PMA on behalf

1. The record in the court below consists of a Joint Appendix, hereinafter cited as "R." The Petition for Writ of Certiorari is hereinafter cited as "Pet."

of longshoremen and marine clerks employed by PMA members. (*Ibid.*)

Intervenor Marine Terminals Corporation (MTC) is a member of PMA who employs longshoremen and marine clerks on terms negotiated by PMA and ILWU to render stevedoring and terminal services under contracts privately negotiated by Intervenor MTC with its customers. Petitioner is one of the customers serviced by MTC. (R. 614a-16a, 667a.)

In the fall of 1960 PMA and ILWU developed a program to foster the mechanization and modernization of cargo-handling. Their agreement (Mechanization Agreement) was the fruit of collective bargaining negotiations that had commenced in 1957. (R. 618a, 668a.) ILWU agreed to permit drastic and revolutionary changes in cargo-handling to reduce overall longshore costs for the mutual benefit of the work force and the employers. (*Ibid.*)

To protect shoreside employees from the consequences of reduced employment and to share the anticipated savings produced by modernization of longshore operations, the members of PMA agreed to accumulate a twenty-nine million dollar fund over a five and one-half year term for the payment of benefits to eligible longshoremen and marine clerks. (R. 618a-19a, 668a.) To implement this agreement, PMA assessed its members who employ longshoremen and marine clerks whereby each such employer contributed to the mechanization fund on the basis of clerk-man-hours employed and the volume of tonnage handled by such employer during the contract term. (R. 622a-26a, 668a-70a.)

Because of the inability of MTC to utilize the opportunity offered by the Mechanization Agreement to modernize further and reduce its overall costs of longshore labor, the cost of longshore labor employed by Intervenor

MTC to service Petitioner increased. Therefore, Intervenor MTC requested of Petitioner an increase in its stevedore rates. (R. 627a, 669a-70a.) While Petitioner accepted the increase in labor costs resulting from the clerk-man-hour assessment, Petitioner refused to consider in its negotiations with MTC any increase in labor costs resulting from the tonnage assessment, despite the willingness of Intervenor MTC to absorb a portion of such increased labor costs. (R. 627a, 631a, 654a, 669a-71a.)

Intervenor MTC, therefore, refused to make the contributions required by the Mechanization Agreement. (R. 613a, 627a.) Pursuant to its contract obligations with ILWU Intervenor PMA filed suit in the United States District Court against Intervenor MTC, who in turn impleaded Petitioner. (R. 671a.)

Petitioner challenged as unlawful under sections 15, 16, and 17 of the Shipping Act, 1916 the assessments to which PMA members are subject by reason of the Mechanization Agreement. Petitioner asserted that PMA members, being persons subject to the Shipping Act, 1916, had entered into an unapproved "cooperative working arrangement" in violation of section 15 by their implementation of the Mechanization Agreement. Petitioner also asserted that the methods adopted for funding the plan resulted in imposition by Intervenor MTC of inequitable and disportionate charges for its services in violation of sections 16 and 17 of the Act.[2] (R. 613a-14a, 671a-72a.)

On Petitioner's motion the district court referred the questions arising under the Shipping Act to the Commission. (R. 613a, 671a.) A hearing with the production of

2. Petitioner also charged violation of the Sherman Act, but action on these charges has been held in abeyance pending resolution by the Maritime Commission of the Shipping Act issues.

testimony and exhibits resulted. After complete briefing of all issues, the Trial Examiner, on the basis of detailed findings of fact and conclusion of law (R. 611a-56a), rejected Petitioner's charges of violations of the Shipping Act, 1916.

Petitioner's conception of itself as a victim of a price-fixing conspiracy among the so-called "liner interests" of PMA was also rejected.[3] (R. 649a-51a.) The Trial Examiner found:

> [1] There is no substantial evidence to show that the actions of either the PMA membership or the Board of Directors or the Committee after January 10, 1961 was intended to do more than establish a method of assessment of the membership for contributions to the Mech Fund. . . . (R. 637a.)
>
> [2] There is no substantial evidence to show that the PMA members as such agreed among themselves how this assessment was to be treated after it was made, or that PMA issued any directions to any PMA member as to how it was to handle the assessment after it was made. . . . (R. 637a.)
>
> [3] That the January 10, 1961 agreement did not include agreement that the Mech Fund charge was to be passed on by the PMA members seems clear from the actions and events that occurred involving the Respondents and the VW charge. . . . (R. 638a.)
>
> [4] Respondents entered negotiations with Volkswagen for the establishment of a new rate wherein Respondents would absorb part of the Mech Fund. This offer Volkswagen rejected. These discussions and actions would have been so much surplusage if the January 10, 1961 agreement had provided that the Mech Fund charge was to be passed on to the customer. . . . (R. 638a-39a.)

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3. Petitioner, by innuendo at least, in its Statement of the Case continues to press this far-fetched view upon this Court, notwithstanding that its conception of the facts has been rejected.

At Petitioner's request, the Maritime Commission reviewed the Trial Examiner's decision. On relevant issues it adopted his findings of fact and affirmed his conclusions of law. With respect to the issues presented under section 15 of the Shipping Act, 1916, the Commission held that "agreements which affect only labor-management relations" are not covered by the Act, but that an "additional agreement" among PMA members "to pass on all or a portion of its assessments" must be "demonstrated" to establish an agreement within the Act. The Commission found the record "devoid of evidence showing the existence of such an additional agreement." (R. 675a.)

With respect to whether a violation of section 16 had occurred, Petitioner had admitted "that all of the relevant case law requires a showing that competitive cargo has been preferred," and that its cargo had not been "subjected to 'prejudice or disadvantage' " as compared to competitive cargoes. Hence, Petitioner had failed to establish a section 16 violation. (R. 676a.)

With respect to the section 17 issues, the Commission concluded on the basis of established principles,[4] that there is no statutory requirement that the various users of a maritime facility be charged identically "as long as 'substantial benefits' are provided" for the charges assessed. (R. 677a.) The Commission found that Petitioner secured substantial benefits from the Mechanization Agreements. (*Ibid.*) Further, the method adopted by PMA for the funding of the Mechanization Agreement was, the Commission concluded, indicated by sound business judgement, and, being modeled after the methods for collection of association dues that had been in use within the industry for many years without protest, was "reasonable." (*Ibid.*)

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4. See, *e.g.*, Evans Cooperage Co. v. Board of Comm'rs, 6 F.M.B. 415 (1961).

The court of appeals, after full consideration of the record as a whole and all arguments urged by Petitioner for reversal of the Commission's determination, in a careful and detailed opinion affirmed the Commission on all points. (371 F. 2d 747 (D.C. Cir. 1966).) Consistent with this Court's recent decision in *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607 (1966), the court of appeals recognized that deference to the Commission's expertise was required, "especially in view of the technical and specialized nature of the subject area over which it has jurisdiction." (371 F.2d at 755.)

Applying these principles, the court of appeals concluded there is "substantial evidence in the record considered as a whole" to support the Commission's decision that the PMA method for funding the Mechanization Agreement, "standing alone does not come within the provisions of Section 15" of the Act, and that despite such doubts as Petitioner's presentation may have created, the record supported "the Commission's determination that there was no additional agreement." (*Id.* at 755-56.)

After "careful consideration" of Petitioner's contentions under sections 16 and 17, the court of appeals affirmed the Commission's determinations that the method adopted by PMA for funding the Mechanization Agreement was reasonable and did not result in prejudice or descriminatory charges by MTC for its services to Petitioner. (*Id.* at 756-60.)

IV.

ARGUMENT

The recent decision of this Court in *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607 (1966) emphasized that the court of appeals, when reviewing the actions of the

Maritime Commission, are bound by the substantial evidence rule. This Court noted that whether the court of appeals would have reached the same result as the Commission is immaterial when the agency's action has a reasonable basis in law and is supported by the whole record. Thus, the "deference" accorded the Commission's decision by the court of appeals in this case was required by this Court.

The decision of the court of appeals that the determinations of the Commission have a reasonable basis in law and are supported by the record as a whole disposes of the issues raised under the Shipping Act. A substantial question for review is not presented to this Court when, as in this instance, Petitioner merely seeks review of disputed evidence and specific facts, all of which have been resolved by the Trial Examiner, Maritime Commission and court of appeals contrary to Petitioner's views.[5]

In an effort to give legal content to its Petition, Petitioner dubs the grounds of decision in *Consolo* as "conventional" and argues that reliance thereon by the court of appeals for resolution of the section 15 issues was misplaced. Petitioner asserts that questions involving the scope of section 15 are "peculiarly within the judicial competence"[6] and, therefore, Petitioner's view as to the "plain meaning"[7] of the statute should have been considered by the court of appeals de novo without "deference" to the Commission's views.

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5. NLRB v. Waterman S.S. Corp., 309 U.S. 206, 208-09 (1940); General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 178 (1938) *aff'd*, 305 U.S. 124 (1938); Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 509 (1924).

6. Pet. 18-19.

7. Pet. 12-17.

On the issues presented under sections 16 and 17, Petitioner reverses its attack by embracing the "conventional" rules circumscribing judicial review and asserting that the court of appeals erroneously affirmed the Commission's decision on grounds not invoked by it.[8] These fanciful interpretations of the proceedings below will not bear analysis.

A. The Commission's Decision Concerning the Scope of Section 15 in This Litigation Is Entitled to Deference and Accords with Established Rulings Developed Over Fifty Years and Is Required by the Legislative Policies Underlying the Shipping Act, 1916.

Among other things, section 15 of the Shipping Act, 1916, requires the filing with the Commission by "persons subject to" the Act of any and all agreements "fixing or regulating transportation rates or fares . . . controlling, regulating, preventing, or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement."[9] Petitioner's primary case before the Commission, as in its Petition, was that the funding method adopted by PMA for implementation of the Mechanization Agreement comprises a "cooperative working arrangement" within the meaning of section 15. The gist of Petitioner's argument has been that *all* agreements among persons subject to the Act, whatever their effect on competition, are "cooperative working arrangements" subject to filing with and approval by the Commission. No authority whatsoever has ever been presented for this bold construction of the Act.

The "plain meaning" of section 15 urged by Petitioner upon the Commission, the court of appeals, and this Court

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8. Pet. 24-27.

9. 46 U.S.C. § 814.

leads to the conclusion that the members of the shipping industry have for a generation been engaged in unlawful conduct under the Shipping Act. The members of PMA have collectively entered into agreements to form and finance their collective bargaining associations; they have agreed to the presentation of uniform bargaining programs in negotiations with the maritime union; they have collectively accepted the contracts achieved by such negotiations and have provided, through agreements reached within their associations, for the administration and implementation of their union contracts. None of these "agreements" or "undertakings" that underlie the collective conduct of their labor-management relations has ever been filed with or approved by the Maritime Commission or its predecessors. Yet all of these activities of the bargaining associations of maritime employers have indirectly affected transportation rates.

Such agreements and undertakings among the members of PMA, no less than the funding method adopted by PMA for implementation of the Mechanization Agreement, have established uniform costs for all employers of maritime labor. Indeed, the primary object of industry-wide bargaining has been to establish uniform wages, fringe benefits, and working conditions. This function of the bargaining process in the shipping industry has been common knowledge for decades.[10] No one has heretofore suggested that such collective activities engaged in by "persons subject to" the Shipping Act are "cooperative working arrangements" covered by the Act.

It is not, therefore, surprising that the Commission concluded that the Shipping Act had never been construed to cover such collective action on the part of "persons subject

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10. Maritime Labor Board, Report to the President and to the Congress (1940).

to" the Act, and that agreements which affect only labor-management relations are not "cooperative working arrangements" covered by section 15. It is surprising, however, that anyone could seriously maintain, as has Petitioner, that the Commission's view as to the scope of its jurisdiction over such matters is not entitled to deference and that the questions involved are "peculiarly within the judicial competence" to resolve.

Whether an agreement constitutes an "exclusive or preferential cooperative working arrangement" within the meaning of the Act unquestionably presents a mixed question of fact and law. The decisions of this Court clearly establish that the Congressional policy is to accord regulatory agencies broad discretion to determine such questions for themselves. *Atlantic Refining Co. v. Federal Trade Comm'n*, 381 U.S. 357, 367-68 (1965); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944); *Gray v. Powell*, 314 U.S. 402, 411-12 (1941); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939). Lower courts have recognized that the determinations of the Maritime Commission on such questions, no less than those of the NLRB, are entitled to great deference when construed in the light of the record and supported by a reasonable basis in law. *Alcoa S.S. Co. v. Federal Maritime Comm'n*, 321 F. 2d 756 (D.C. Cir. 1963); *Trans-Pacific Freight Conference of Japan v. Federal Maritime Comm'n*, 314 F. 2d 928 (9th Cir. 1963).[11]

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11. *E.g.*, the court in *Alcoa* held that the Commission's determination of what is

> "unjustly discriminatory or unfair." . . . obviously turns upon a determination of facts—a function committed by Congress to the Commission, an expert body whose findings in this regard are not lightly to be disregarded by a reviewing court. (321 F.2d at 759.)

The court in *Trans-Pacific* said

> we think it is within the competence of the Commission . . . to construe the words "employed by" in the light of the record which was before the Commission. (314 F.2d at 935.)

This case, moreover, presents an excellent example of why deference must be accorded the agency's determination of such questions. The legislative material[12] developed over a half century will be searched in vain for an indication that Congress has ever intended the Commission to assume jurisdiction, under the Shipping Act over the activities of the members of the industry in negotiating, administering and implementing their labor contracts. No administrative or judicial decision has ever suggested that such "agreements" or undertakings among "persons subject to" the Act are "cooperative working arrangements" within the scope of section 15.[13]

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12. See, *e.g.*, House Comm. on Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914) [Alexander Report]; Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961); Hearings on H.R. 6775 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce, 87th Cong., 1st Sess. (1961) [Steamship Conference/Dual Rate Bill]; Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary, 86th Cong., 1st Sess., ser. 14 (1959); Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries, 86th Cong., 1st Sess. (1959) [Steamship Conference Study].

13. In such cases as have been concerned with the meaning of the term "cooperative working arrangement" as used in section 15, the rule of *ejusdem generis* has been applied to determine the content of the phrase, or it has been assumed that it was included in the Act to preclude avoidance of the regulation of the specific practices enumerated in the section by the "manner" in which the prohibited understanding was reached. See Unapproved Section 15 Agreements—North Atlantic-Spanish Trade, 7 F.M.C. 337 (1962); Unapproved Section 15 Agreements—South African Trade, 7 F.M.C. 159 (1962); Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co., 7 F.M.C. 43 (1962); Unapproved Section 15 Agreements —West Coast South American Trade, 7 F.M.C. 22 (1961); Maatschappij "Zeetransport" N.V. (Oranje Line) v. Anchor Line, Ltd., 6 F.M.B. 199 (1961); American Union Transport, Inc. v. River Plate & Brazil Conferences, 5 F.M.B. 216 (1957), *aff'd*, 257 F.2d 607 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 828 (1958); Associated-Banning Co. v. Matson Nav. Co., 5 F.M.B. 432 (1958); *In re* Wharfage Charges & Practices at Boston, Mass., 2 U.S.M.C. 245 (1940).

It has long been recognized that the Act was adopted by Congress to secure the regulation and supervision of trade practices in the industry so as to foster the commerce of the United States. See *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 487-490 (1958).[14] Therefore, the statute does not include guidelines suggesting how the Commission should supervise activities concerned with maritime labor relations.[15] The Commission has not developed a staff or accumulated the experience for such a vast undertaking.

Finally, the assumption of regulatory power urged upon the Commission by Petitioner would result in serious restriction of the freedom of labor and management to bargain collectively. This Court has recently stated that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."[16] The Commission's refusal to assume such jurisdiction, and its reliance (R. 675a) on court decisions such as *Kennedy v. Long Island R.R.*, 211 F. Supp. 478, 489 (S.D.N.Y. 1962), *aff'd.*, 319 F. 2d 366, 374 (2d cir. 1963), *cert. denied*, 375 U.S. 830 (1963), in which similar provisions of the Interstate Commerce Act (49 U.S.C. § 5(1)) were held inapplicable to agreements affecting only labor-management relations, places the Commission's decision squarely in accord with contemporary interpretations of Congressional labor policy, as distinguished from Congressional policies

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14. PMA is not a rate-making conference and no one has asserted otherwise. (R. 128a, 179a.)

15. Petitioner's reliance (Pet. p. 20) on decisions of the Civil Aeronautics Board for a contrary result are misplaced since the Federal Aviation Act, unlike the Shipping Act, 1916, directs the CAB to promote the policies of the Railway Labor Act which governs labor relations in the airline industry. (49 U.S.C. § 1371 (K)(4).)

16. NLRB v. Insurance Agents' Int'l, 361 U.S. 477, 488-90 (1960).

regarding transportation or trade practices.[17] Surely, deference must be accorded the Commission's view that expansion of its jurisdiction to cover collective actions implementing labor contracts and policies *cannot* be justified under the Shipping Act, 1916, which was derived from the Interstate Commerce Act and designed to secure governmental supervision over restrictive trade practices in the shipping industry. See *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 484-85 (1932).

In an attempt to undermine the respect to which the Maritime Commission's views (like those of other agencies) are entitled, Petitioner complains that the Commission restricted the coverage of section 15 to only those agreements between parties in direct competition with each other. (Pet. pp. 13-14.) The Commission, on the contrary, recognized that the section applies to all agreements involving trade practices that affect competition regardless of whether the participants are vying with each other for the patronage of another person.

The Commission's recognition of this principle (R. 673a-74a) is demonstrated by its citation of *D. J. Roach, Inc. v. Albany Port Dist.*, 5 F.M.B. 333, 335 (1957), where the predecessor agency noted the applicability of section 15 to a lease between the owner of terminal premises and the operator thereof. Obviously the owner and operator are *not* in direct competition for the patronage of the users of a marine terminal.

The Commission's refusal, in the end, to classify agreements fixing uniform and common labor costs for members of an industry as agreements involving trade practices affecting competition is not unique. Petitioner's mistaken

17. See *ibid.*

view that competition is unlawfully restricted by such agreements because "wages always affect prices" (Pet. pp. 14-17) was rejected by Congress during the intense debates occasioned by the Taft-Hartley Act.[18] The activities of multiple-employer groups in establishing uniform labor costs for an industry were not considered as frustrating the national policies furthering competition. It is now accepted that effectuation of the national labor policies is assisted by activities of multiple-employer bargaining groups. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 94-96 (1957).

Finally, Petitioner's suggestion that the decisions below will permit "anti-competitive arrangements" to escape "governmental scrutiny" is nonsense. The "cooperative working arrangements" described in the Commission's Annual Report for 1966 are unaffected by this litigation. None of these arrangements involve "agreements" or "undertakings" by the members of the industry to establish uniform labor costs. Nor is the action of the PMA membership in implementing the Mechanization Agreement free from "governmental scrutiny" merely because it is not a "cooperative working arrangement" within section 15. Many decisions of this Court make clear that the Sherman Act prevents employers and labor unions from engaging in monopolistic and anti-competitive practices under the guise of managing their labor-management relations.[19] While we deny that the members of PMA have so conducted their

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18. See 93 Cong. Rec. 5144 (May 12, 1947).

19. See, *e.g.*, United States v. Women's Sportswear Ass'n, 336 U.S. 460, 463 (1949); United Brotherhood, Carpenters & Joiners v. United States, 330 U.S. 395, 400 (1947); Allen-Bradley Co. v. Local 3, Electrical Workers, 325 U.S. 797 (1945); Cox, *Labor and Anti-Trust Laws—a Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 255 (1955).

affairs, the federal court provides a forum for scrutiny of their activities and effective remedies if Petitioner can establish such unlawful conduct.[20] The Commission properly refused to assert its jurisdiction over causes arising under the Sherman Act.[21]

B. The Questions Raised Under Sections 16 and 17 of the Act Involve Technical Issues Within the Peculiar Competence of the Commission, and the Basis for Its Decision Was Affirmed by the Court of Appeals on Its Review of the Whole Record.

Petitioner recognizes that questions respecting "undue or unreasonable preference" and "unreasonable prejudice or disadvantage" under section 16, and the enforcement of "just and reasonable regulations and practices" under section 17, are peculiarly within the Commission's competence to resolve. (Pet. 27.) To undermine the court of appeal's affirmance of the Commission's determinations on these questions, Petitioner asserts that the court below affirmed the Commission on grounds not invoked by it. (Pet. 24-27.) A comparison of the court's decision with the Commission's on these questions does not support this charge. The Commission and court alike rejected Petitioner's suit on these questions because, contrary to Petitioner's allegations, "substantial benefits" resulted from the Mechanization Agreement, and the allocation of the labor costs incurred thereunder was reasonable since it was supported by "necessary" business considerations, and followed the method by which Association dues had been levied for years without challenge.[22]

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20. See *ibid.*

21. See 15 U.S.C. § 4; *cf.* Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173, 186 (1959); McLean Trucking Co. v. United States, 321 U.S. 67, 85-86 (1944).

22. *Compare,* Commission's decision (R. 68a-69a, 677a-78a) *with* court's decision. (371 F.2d 747, 758-60.)

Moreover, the court below additionally gave "careful consideration" (371 F.2d at 756) to each of the arguments presented by Petitioner for reversal of the Commission. These arguments were, as the court below recognized (*Id.* at 757), derived from the views of Commissioner Patterson, sole dissenter from the Commission's determinations under sections 16 and 17. Petitioner reargued in the court below theories that the Commission had refused to adopt.

Petitioner now complains because the court below, instead of limiting its review to whether the record supported the Commission's determination, also carefully considered the dissenter's views and, like the Commission, was unpursuaded. (*Id.* at 756-58.) We do not doubt that if the court below had refrained from this consideration, Petitioner would now complain that the court below had improperly restricted its review. The court below, however, cannot now be faulted for having reviewed and rejected the views of the dissenting Commissioner while at the same time it affirmed on the basis of the whole record the determinations of the majority of the Commission.

The Commission, of course, did not hold that section 17 was violated only when "improper motivation" had been established, as Petitioner now asserts. (Pet. 23.) The Commission merely observed that a charge otherwise lawful would not be sustained, if there was a "design deliberately" to burden one user of a maritime facility more than another. This observation was not inappropriate in view of Petitioner's persistent but unproven[23] allegations that it was the victim of "deliberate design" on the part of the "liner interests" of PMA to shift their labor costs to Petitioner.

Nor was it improper for the court of appeals to refrain from considering Petitioner's arguments under *New York*

23. See Initial Decision of Examiner, R. 649a.

Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Comm'n, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 910 (1965). Petitioner had not only conceded before the Commission that the legal authorities under section 16 required the showing of preferences as to competitive cargoes (R. 676a), but also had failed to establish the applicability of the *Freight Forwarders* case, which is dependent upon showing that "random" charges are being made for identical services. (337 F.2d at 299.) In view of the Court's affirmance of the Commission's determination that the charges were "reasonable," the *Freight Forwarders* case was irrelevant.[24]

V.

CONCLUSION

Unquestionably, the Mechanization Agreement required the collection of a substantial sum of money for the payment of important employee benefits. Unquestionably, all persons interested in the operations of the Pacific Coast shipping industry were affected, directly or indirectly, by this sweeping labor program. These are not, however, adequate reasons for the granting of Certiorari. The costs of the Mechanization Agreement are an insignificant fraction of the entire cost of longshore labor during the five and one-half year term of the initial Mechanization Agreement. Despite the effect of the Agreement for everyone involved

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24. It should be obvious that the services rendered by stevedore contractors in handling one cargo (such as automobiles) are *never* identical with services involving other cargoes, such as cotton, canned goods, or locomotives. Petitioner obscures this truism when it invokes Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303 (1937). (Pet. 21.) The Mechanization Agreement was not designed to establish rates for "identical services" and "facilities." It provides a means of permitting efficient use of dock workers by their employers and fixes one cost of shoreside labor. (371 F.2d at 758.)

with the operations of the industry, only Petitioner has complained. Significantly, the Army, probably the single largest shipper employing the facilities of the industry and required to employ commercial stevedore contractors covered by the Agreement, has not during the pendency of this litigation found any reason for joining Petitioner in its challenge to the Agreement and its implementation by the PMA membership. Yet the Army's interest in requiring strict observance of the laws regulating the industry far outweighs those of Petitioner.

We respectfully submit that the careful review of the Maritime Commission by the court of appeals, in accordance with the mandate of the *Consolo* decision, deserves the respect of this Court, and the Petition for Writ of Certiorari should be denied.

Dated: April 14, 1967.

Respectfully submitted,

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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

THURGOOD MARSHALL,
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264-461—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1168

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner asks this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit sustaining the order of the Federal Maritime Commission in this case. On behalf of the United States,[1] the Solicitor General, believing that the court of appeals' decision was erroneous and that the case meets the criteria for review on certiorari, urges that the petition be granted.

STATEMENT

The facts are stated at length in the various opinions (Pet. App. A; J.A. 611a–658a, 666a–728a), and need

[1] The United States was a statutory respondent in the court of appeals (see 5 U.S.C. 1034), and is accordingly a party in this Court. It supported the Commission in the court below.

only be sketched here. Petitioner is the manufacturer of Volkswagen motor vehicles, which it ships, chiefly on chartered vessels, to ports on the west coast of the United States. The non-governmental respondents are (1) the Pacific Maritime Association, which is composed of the principal common carriers by water, marine terminal companies and stevedore contractors serving west coast ports, and (2) Marine Terminals Corporation, a member of the Association, employed by petitioner to unload its vehicles. In 1961 the Association entered into an agreement with the International Longshoremen's and Warehousemen's Union, which represents the west coast longshoremen, under which the Association undertook to raise for the longshoremen's benefit a "mechanization fund" of $29 million to cushion the impact on the labor force of installing extensive labor-saving equipment and eliminating featherbedding on the west coast docks.[2] The agreement did not specify, and the union ultimately disclaimed all interest in, how the fund would be raised.

The Association's board of directors determined to implement the agreement by assessing each member an annual rate for each ton of cargo handled, the rate to vary according to the type of cargo. The rate for general cargo was set at 27½ cents per ton and for bulk cargo at 5½ cents. Subsequently, it was decided to assess lumber moving in the coastwise trade

[2] The fund was originally to be completely collected by 1966. That date has been extended, however, to permit enlargement of the fund, and the assessment continues in effect.

at only 2½ cents per ton. The assessment also varied according to whether the base used in computing it was weight tons (2,000 pounds, regardless of volume) or measurement tons (40 cubic feet, regardless of weight). It was decided that the measure used would be that described in the manifest (bill of lading) as of 1959. In the case of automobiles, however, there was no consistent practice, most being manifested, in fact, on a unit rather than on a weight or measurement basis. The board of directors decided, nevertheless, to use the measurement-ton basis for automobiles, as had been done in the case of some other assessments by the Association.

This resulted in an average mech fund assessment per Volkswagen automobile of $2.35 (on a weight-ton basis, the assessment would have been only one-tenth of that amount); and some of the marine terminal companies (principally, respondent Marine Terminals Corporation) and stevedore contractors handling Volkswagen made clear to the Association that they could not absorb this assessment themselves—their total charge for unloading a Volkswagen being, on the average, only $10.45 and their profit $1—and would have to pass it on to petitioner in the form of higher charges for unloading Volkswagens. Petitioner refused to pay the additional charge.

Initially, the Association contemplated suing petitioner directly, but eventually it was decided that it would proceed against the terminal companies in a friendly suit and they would implead petitioner, charging breach of contract. Suit was brought in a

federal district court in California. Petitioner defended on the ground that the mech fund assessment violated the Shipping Act, 46 U.S.C. 801 *et seq.* Since this raised issues within the primary jurisdiction of the Federal Maritime Commission, the administrative agency which enforces the Act, the court stayed the suit to permit a determination of these issues by the Commission. Petitioner then filed a complaint with the Commission, charging that the assessment violated Sections 15, 16 and 17 of the Act. After a hearing in which the Association and Marine Terminal Corporation participated, the Commission ordered the complaint dismissed. 9 F.M.C. 77. The court of appeals sustained the Commission's order by the judgment sought to be reviewed here.[3] 371 F. 2d 747. The California suit remains stayed pending completion of judicial review of the Commission's order. And, as mentioned (n. 2, *supra*), the assessment on Volkswagen automobiles continues.

ARGUMENT

This case presents questions of fundamental importance in the administration of the Shipping Act. The first relates to the scope of Section 15 of the Act, 46 U.S.C. 814. This provision requires all agreements among persons subject to the Act[4]

[3] Clearly the Commission's order dismissing petitioner's complaint was a "final order" and hence reviewable only by instituting a judicial review proceeding in the court of appeals. 5 U.S.C. 1032; see *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. No one suggests otherwise.

[4] These include, besides common carriers by water, "any person * * * carrying on the business of forwarding or furnishing

"controlling, regulating, preventing, or destroying competition * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement" to be filed with the Federal Maritime Commission, which is directed to cancel any such agreement "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of" the Act. Furthermore, "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement," and heavy civil penalties are imposed for infractions of this prohibition. Any agreement approved by the Commission is expressly exempted from the antitrust laws.

Section 15 is one of the most powerful deterrents to maritime abuses. By preventing the concealment of concerted action by maritime firms, it forces into the open agreements that might harm shippers or members of the industry. And it empowers the Commission to strike down any such combination if inimical to the commerce of the United States or to the public interest regardless of whether any specific prohibition of law is violated. Section 15 should be construed liberally to effectuate its remedial objectives. Plainly, it encompasses the agreement among the members of the Pacific Maritime Association to impose a special assessment on all cargo handled by

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wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U.S.C. 801.

its members for the purpose of defraying the expense of the mechanization fund. The Commission itself conceded that the agreement was within the literal embrace of Section 15: It is an agreement among persons subject to the Act [5] and it provides a cooperative working arrangement for raising the required moneys. We see no reason not to give the statute its literal force in this case.

The Commission suggested that the filing requirement of Section 15 is designed exclusively for the protection of shippers and that there could be no impact on them here in the absence of an agreement among the Association's members to shift the burden of the mech fund assessment to shippers, in the form of higher rates. We challenge both of these propositions. The Shipping Act in general, and Section 15 specifically, are designed to protect carriers and other persons as well as shippers.[6] If the mech fund assessment bore with unfair weight on certain members of the Pacific Maritime Association, the Commission would have a clear mandate to take corrective action.

At all events, it blinks reality to suggest that the agreement fixing the mech fund assessment on automobiles did not have a direct and substantial impact on shippers. Nominally, to be sure, no shipper was liable for the exaction. But the maritime terminal com-

[5] The Association's carrier members are conceded to be subject to the Act. The Commission assumed as much with regard to the maritime terminal companies. The examiner had specifically so found (J.A. 641a–642a), and we see no substantial question as to the correctness of this finding.

[6] Thus, Section 14 expressly proscribes practices designed to injure competing carriers, and Section 15 itself requires the cancellation of agreements that are unfair "as between carriers."

panies—as they made clear to the Association—could not absorb in its entirety a special assessment equal to 22 percent of their normal charge and more than twice their profit. They had to pass it back to the shipper in the form of a higher charge. An agreement to do so would thus have been superfluous.[7] To require it as a condition of applying Section 15 would exalt form over substance. In our view, any agreement among persons subject to the Act that has a direct and foreseeable effect on the charges paid to such persons by a major shipper must be filed.

We recognize an exception for agreements that relate solely to collective bargaining or labor relations. Cf. *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D. N.Y.), affirmed, 319 F. 2d 366 (C.A. 2),

[7] Herein lay the error of the court of appeals. It assumed with the Commission that an agreement to impose the assessment on petitioner was necessary to bring the assessment arrangement within the filing requirement of Section 15, and, invoking *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, deferred to the Commission's finding that there was no such agreement. As explained in the text above, such an ancillary agreement is wholly superfluous where it is plain that the assessment, although nominally levied against the terminal company, must, as a matter of economic necessity, be shifted by it to the shipper. Actually, the finding that there was no agreement to pass on is highly questionable. Initially, when petitioner made known its unwillingness to pay an additional charge covering the mech fund assessment, the Association planned to sue it directly. And the device eventually adopted was a friendly suit between the Association and the terminal companies with the latter impleading petitioner. The inescapable inference would seem to be that the members of the Association regarded the obligation as ultimately that of the shipper, not the carrier or terminal company. This would be consistent with the traditional practice of the Association's members of passing on Association dues to shippers in the form of higher rates.

certiorari denied, 375 U.S. 830. The basic agreement to provide a mechanization fund in a certain amount for the benefit of the longshoremen would appear to be of this character. At issue, however, is something quite different: the agreement among the Association's members, implementing the contract with the union, to raise the fund required by the contract through a special assessment on the cargo handled by them. This side agreement apportioning the cost of the labor contract is not a part of that contract and involves no question of labor relations. The Association insisted, and the union accepted, that how the money was raised was no concern of the union. The union was satisfied with the Association's assurance that the money would be raised and no one suggests the Association cannot fulfill its obligation to the union by methods which do not violate the Shipping Act.

It is argued that collective bargaining negotiations in the shipping industry might be disrupted by the delays consequent upon obtaining the Commission's approval of a method for funding a particular benefit before any step to implement the method was taken.[8] But this unwarrantedly assumes that the Commission could not or would not act expeditiously in granting or withholding its approval of the method agreed upon. We assume, moreover, that ordinarily any challenge to such an agreement will concern only a particular and severable feature of it—here, the as-

[8] An agreement required to be filed under Section 15 may not be implemented until the Commission has approved it. See p. 5, *supra*.

sessment on automobiles—and that the Commission is free to approve promptly, and permit immediate implementation of, so much of the agreement as is not in dispute. This should minimize any disruptive effect on labor negotiations occasioned by the filing requirement.

There is a further point. Where, as in the present case, questions of legality apart from failure to file are raised, the agreement is under a cloud from the beginning anyway, whether or not it must be filed. An agreement such as that challenged here could violate the antitrust laws[8a] or other provisions of the Shipping Act (*infra*, pp. 10–12). Carriers and others might, therefore, decline to cooperate in carrying out such an agreement, fearing treble-damage liability. *Carnation Co.* v. *Pacific Conference*, 383 U.S. 213. In these circumstances, the processes of collective bargaining may be more helped than hindered by the availability of a procedure for removing legal uncertainty at the outset: filing the agreement with the Commission. If the Commission approves it, its consistency with the Act is established and antitrust immunity conferred, giving the parties a green light to implement it. The scheme of the Act is that maritime agreements raising serious regulatory issues should be scrutinized by Commission *in limine*, not left to later or piecemeal

[8a] As an agreement determining how joint costs are to be passed on to customers, it could be regarded as a form of price-fixing illegal under the Sherman Act. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–224. That the joint costs originated in a collective bargaining agreement does not create an antitrust exemption. *Mine Workers* v. *Pennington*, 381 U.S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676.

challenge, and this seems to us a salutary policy in this as in other contexts.[9]

The question whether the agreement imposing the mech fund assessment must be filed under Section 15 is, of course, distinct from the merits of the agreement. If this Court holds that it must be filed, the Commission will be required to scrutinize its merits under the standards of Section 15. Quite apart from that section, however, petitioner argues forcefully that the agreement violates Section 17 of the Shipping Act, 46 U.S.C. 816.[10] We are not prepared at this stage to offer a definitive view on the legality of the agreement under this section. We do think, however, that the Commission's analysis was inadequate and that it should take a fresh look under proper standards when the matter is returned to it.

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[9] A holding that the agreement should have been filed would not, we believe, entail disruption of the mech fund, notwithstanding the provision of Section 15 (n. 8, *supra*) making unlawful the implementation of an agreement that is required to be filed before it is approved. We assume that the members of the Pacific Maritime Association, having paid the assessment voluntarily, will not seek restitution—and that if they did the Commission would exercise its discretion to deny them any such relief. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621–622.

[10] Petitioner also argues that Section 16 of the Act, 46 U.S.C. 15, was violated. It forbids persons subject to the Act to subject "any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The Commission held that Section 16 is violated only if there is a discrimination between competitors, and none here is suggested, the marine terminal companies having imposed no higher charge on Volkswagens than on other automobiles. The Commission's view is supported by

Section 17 requires every person subject to the Act to observe "just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property," and it seems clear that the conduct of the marine terminal companies in tacking on the mech fund assessment as an additional charge for unloading Volkswagens is within the purview of this provision, and hence unlawful if it is unjust or unreasonable. Petitioner established, we think, a *prima facie* case of the unreasonableness of the automobile assessment. It appears indeed disproportionate. On a weight basis, it is 10 times the assessment on other general cargo, 50 times the assessment on bulk cargo, and 100 times that on coastwise lumber. The assessment raises the cost of unloading Volkswagens by 22 percent, compared with an average of 2 percent for other cargo. And in deciding to assess automobiles on a measurement-ton basis the Commission departed from its general rule of computing the mech fund assessment on the basis of how the cargo is manifested. Yet, it is conceded that the mechanization which the assessment is to finance will do little to reduce the costs of unloading automobiles; the primary benefits will be received by other classes of cargo.

Perhaps the disparate and seemingly arbitrary treatment of automobiles can, nevertheless, be justified. But we think the Commission failed to do so

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the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), on which Section 16 of the Shipping Act is modeled. See *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26–27.

in its opinion. It stressed that no intention to discriminate against petitioner had been shown—but surely that is not required to predicate a finding of unreasonableness. It seems equally wide of the mark that petitioner will realize some benefits from the mechanization program, since they are conceded to be disproportionately small. And even if, as the court of appeals suggested (Pet. App. A, 24a–25a), "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits," that precept seems inapplicable here. For the complaint is not that petitioner fares badly under a uniform rule of general applicability; it is, rather, that in assessing automobiles the Association departed from its general rule of following the manifest, instead devising a special rule limited to automobiles. No reason appears why it would have been impracticable to have assessed automobiles on some basis that would have brought them more into line with other general cargo.

At all events, a question of general importance is presented concerning the circumstances and standards under which one type of cargo or one class of shippers may be required to bear more than its pro rata share of an industry joint cost. This is additional reason why review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
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MAY 1967.

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In the Supreme Court of the United States

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VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
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PACIFIC MARITIME ASSOCIATION AND
MARINE TERMINALS CORPORATION, INTERVENORS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE FEDERAL MARITIME COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 371 F.2d 747. The opinion of the Federal Maritime Commission (R. 666a-728a)[1] is reported at 9 F.M.C. 77.

[1] "R" refers to the Joint Appendix printed for the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a) was entered on December 22, 1966. The petition for writ of certiorari was filed on March 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a rational basis for the Federal Maritime Commission's ruling that an agreement among ocean common carriers and marine terminal operators to allocate among themselves the industry labor cost of a collective bargaining agreement, standing by itself, (that is, without an additional agreement to pass on a part or all of these costs) is not an agreement of the type required to be filed for approval under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

2. Whether there was a rational basis and substantial evidence in support of the Commission's judgment that the method of assessing automobiles which resulted from the agreement to allocate labor costs did not constitute unreasonable prejudice in violation of Section 16 of the Act and was not an unreasonable practice in violation of Section 17 of the Act.

STATUTES INVOLVED

The pertinent provisions of the Shipping Act of 1916, 46 U.S.C. § 801, *et seq.*, are set out in the petition, pp. 3-4.

STATEMENT

Petitioner is a German corporation which manufactures Volkswagen automobiles and ships those automobiles to ports on the United States Pacific Coast by

means of common carrier and chartered (contract) vessels. Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (MTC) were the respondents in the Commission complaint proceeding, were intervenors before the court below, and are intervenors here. MTC operates ocean terminals and performs stevedoring services at San Francisco and Long Beach, most of which is performed for common carriers. MTC belongs to carloaders associations whose agreements have been filed with and approved by the Federal Maritime Commission, pursuant to section 15 of the Act. Pacific Maritime Association (PMA), an intervenor in the Commission complaint proceeding, and also an intervenor in the court below and before this Court, is a nonprofit corporation organized in 1949 for the purpose of negotiating and administering labor contracts (R. 667a) with labor unions, on behalf of its membership. Common and contract carriers, marine terminal operators, and stevedore contractors are eligible for membership in PMA, although shippers *per se* are not eligible for such membership. Collective bargaining between PMA, on the one hand, and the unions, on the other hand, is confined to longshore functions, i.e. the work of longshoremen and marine clerks. Insofar as this case is concerned, only the longshore functions are relevant (R. 616a).

The membership of PMA is made up of approximately 150 companies (R. 179a), and the organization itself has some 150 employees.[2] In addition to a pres-

[2] PMA derives its funds for the carrying out of its operations through assessments and membership dues, which are determined by the Board of Directors (R. 616a-617a).

ident, there are three vice-presidents who are in charge of finance, labor relations, and administration, respectively. PMA also has a director of offshore labor relations, a manager of a contract data department, and a bureau concerned with accident prevention (R. 180a). PMA's staff is concerned with such tasks as unemployment insurance claims, operating a central pay office for stevedores and terminal operators in the major ports, and maintaining certain area offices (*Ibid.*). PMA is not a ratemaking conference, and it has no responsibility or connection with ratemaking (R. 179a).

PMA undertakes to bargain collectively on behalf of its members with the International Longshoremen's and Warehousemen's Union (ILWU). Until recently, the labor situation at West Coast ports had been a chaotic one for some years. General maritime strikes occurred in 1934 and in 1936 (R. 183a), and relations between the union and employer groups thereupon became extremely strained. These events were followed by a third general strike in 1948, which lasted over one hundred days (R. 184a). After that strike, employers attempted to improve employer-union relations, but such attempts were generally unsuccessful. The employers complained of declining productivity, a worsening of work practices, and work stoppages, all of which resulted in steamship lines going out of business (R. 185a). In 1957, therefore, the situation was so acute that PMA attempted to negotiate with the ILWU to obtain guarantees that the employers would be free from strikes and slowdowns and would be able to introduce work-saving devices (R. 618a). In return, the

ILWU wanted assurances that workers would share in the monetary benefits realized from such work-saving devices, that there would be no acceleration of productivity demanded from individual workers, and, finally, that there would be no unsafe conditions created as a result of the introduction of work-saving devices (R. 618a).

After preliminary negotiations, PMA agreed to accumulate a fund of approximately $1,500,000 for the benefit of its members' employees (*Ibid*). This fund was described by the president of PMA as "earnest money—to demonstrate to the union that we were not just talking but seriously intended to reach a conclusion with them . . . " (R. 194a). At the same time, the ILWU agreed to a further study of mechanization which would be completed not later than June of 1960 (R. 246a-247a).

On October 18, 1960, PMA and the ILWU signed a "Memorandum of Agreement on Mechanization and Modernization." This agreement set up a "Mechanization and Modernization Fund" of $29,000,000, which sum was to be raised by PMA over a period of time to extend to July 1, 1966, on which date the agreement would expire (R. 274a). The fund was to be used to protect longshoremen and marine clerks from the consequences of reduced employment opportunities resulting from the modernization of longshore operations (Pet. App. 3a). As PMA's membership was responsible for the accumulation of the fund, the ILWU agreed to allow PMA solely to determine how the fund would be accumulated. During the negotiations leading up to the agreement on the fund, both PMA and

the ILWU had established a position with regard to the method of collection of the fund, but PMA eventually obtained the ILWU's agreement to allow PMA to determine the method, "inasmuch as the employer members of the bargaining unit had committed themselves specifically to the payment of the sum . . ." (R. 207a).

In order to raise the money required by the mechanization agreement, PMA appointed a Work Improvement Fund Committee to recommend how PMA members should be assessed. It is the method of raising the money from the members which gave rise to this litigation.

The Committee considered various methods of allocating this new labor cost: (1) contributions based on man-hours of each employer; (2) contributions based on cargo tonnage; (3) a combination of these; (4) a charge on cargo tonnage moving in containers; and (5) a system based on measurement of improvements in longshore productivity (R. 466a-467a; 92a-93a). A majority of the Committee recommended that the members be assessed on the basis of tonnage carried or handled. The considerations which led to this recommendation were summarized by the court below as follows (Pet. App. 21a):

> The Committee recommended a formula based on cargo tonnage as a "rough-and-ready" way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It con-

> sidered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.
>
> The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop. [Emphasis in original.]

In recommending the tonnage formula, the Committee noted that it would be the same as the formula which had been used for the computation of a portion of PMA dues (R. 470a). Tonnage dues, based on revenue tons of cargo, had been used for many years by PMA. It had also been the practice of PMA to use tonnage for the purpose of allocating other labor costs, the maintenance of dispatch halls along the coast, the cost of paying arbitrators' salaries, etc. (Pet. App. 21a-22a; R. 217a).[3]

The formula recommended by a majority of the Committee was adopted by PMA. Under the formula, each member would remit to PMA as trustee of the fund an amount equal to 27½¢ per ton of general cargo

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[3] In fact, the ILWU had proposed the tonnage formula, and requested that the formula be incorporated in the collective bargaining agreement, but PMA did not wish to limit its discretion in choosing the most reasonable formula it could devise (R. 201a). PMA told the ILWU it wanted flexibility to allocate the labor cost. PMA also feared that if a tonnage formula were included in the collective bargaining agreement, it would have a tendency to persist into the next contract (R. 210a; Pet. App. 21a).

carried or handled, and 5½¢ per ton of bulk cargo, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement. The assessment was to be based on the cargo as manifested for loading or discharging and so the amount of the assessment for a particular commodity would be related to whether the commodity was manifested by weight or measurement tons.

Unlike other cargo, however, which is usually manifested consistently either on a weight or measurement basis, automobiles are not uniformly manifested one way or another. PMA determined that for purposes of the mechanization fund automobiles should always be assessed on a measurement ton basis, however manifested (Pet. App. 4a). This method of assessing members on automobiles for the mechanization fund was the same as the method that had been used and was still being used in assessing members on automobiles for PMA dues (R. 524a).

A Volkswagen measures 8.7 tons on a measurement ton basis, whereas it measures only 0.9 tons on a weight ton basis. An assessment for the fund based on measurement tons at 27½¢ per ton equals $2.35 per vehicle; the same assessment on a weight ton basis equals $.25. Thus, the amount of the contribution to the fund on automobiles on a measurement ton basis was almost 10 times as great as on a weight ton basis (Pet. App. 4a-5a).

As a result of the contributions required by the formula adopted by PMA, the stevedore members of PMA increased their stevedore rates to the common carrier

members (R. 671a).[4] Respondent MTC, the PMA member which handles the unloading of petitioner's vehicles, increased its stevedore rates to petitioner, and this increase raised the cost of discharging petitioner's vehicles almost 25 percent. Petitioner refused to pay any increase resulting from an assessment based on measurement tons, even though MTC was willing to absorb a portion of the increase (*Ibid*).[5]

MTC could not itself absorb the entire assessment on automobile cargo. Therefore, when petitioner refused to pay the increased rate, MTC did not pay the assessment to PMA (R. 613a; Pet. App. 5a). PMA brought suit against MTC in the United States District Court, which then impleaded petitioner. Upon petitioner's request the district court stayed the court proceedings pending the submission to the Federal Maritime Commission of issues raised by petitioner concerning the legality of the assessments under the Shipping Act.

Petitioner thereupon filed a complaint with the Commission (R. 12a-17a). The complaint alleged that PMA, MTC and other members of PMA had entered into an agreement to impose upon petitioner an extra charge for terminal and stevedoring services in the form of an assessment and that since such agreement has not been filed with and approved by the Commission pursuant to section 15 of the Act, it is illegal and the assessment may not be imposed. The complaint

[4] Generally common carriers which pay for loading and unloading as part of the terms of carriage absorbed the increases resulting from the assessment (R. 632a-633a, 671a).

[5] Petitioner was the only shipper of automobiles who protested the assessments for the fund (R. 633a).

further alleged that the assessments adopted by PMA subjects petitioner and automobile cargo to undue prejudice, in violation of section 16 of the Act, and comprises an unreasonable practice in violation of section 17 (R. 14a).

After a full evidentiary hearing, the hearing examiner made extensive findings of fact and ruled that petitioner's allegations had not been sustained (R. 611a-656a). On exceptions to the examiner's decision, a majority of the Commission affirmed (R. 666a-678a). Proceeding on the assumption that both MTC and the other members of PMA were subject to the Act (R. 673a),[6] the Commission found that the agreement of the PMA members for allocating among themselves the industry labor cost incurred by virtue of the agreement with the union, was not, without more, within the scope of section 15 of the Act. Such an agreement, standing by itself, unlike an agreement among the members to pass on a part or all of the costs to shippers or carriers, has no impact on outsiders. On the other hand, had there been an additional agreement by the PMA membership to pass on the costs, it would have been subject to section 15 (R. 675a).

With respect to section 16, the Commission found that no violation had occurred because petitioner had failed to show that cargo competitive with its automo-

[6] MTC had argued that they were not "other persons" under section 1 of the Act, 46 U.S.C. 801 (R. 641a); PMA had argued that the method of raising the money to implement the agreement with the ILWU is part of a collective bargaining agreement and that the National Labor Relations Board had exclusive jurisdiction over it (R. 649a). The Commission did not resolve the jurisdictional issue but assumed for purposes of its decision that MTC and PMA were subject to the Act (R. 673a).

biles, namely, other automobiles, had been preferred and so its automobiles had not been subject to "prejudice or disadvantage".

The Commission further found no "unreasonable practice" in violation of section 17 (R. 677a), noting that "substantial benefits" had accrued from the mechanization agreement and that there is no statutory requirement that there be a precise equivalence between services and charges for all users of a facility. Contrary to petitioner's frequently recurring allegation, the Commission found that the method of allocating the costs was not adopted because of a design deliberately to burden automobile cargo more than other types of cargo, but was dictated by adequate business consideration and followed the precedent which had been used for collecting dues without protest (R. 677a).

In an exhaustive opinion (Pet. App. 1a-25a), which specifically took into account each of petitioner's points, the court of appeals—per Circuit Judges McGowan, Tamm and Leventhal—sustained the Commission in all respects. Giving due deference to the expertise of the Commission, the court upheld as tenable the position taken by the Commission that the agreement among PMA members for allocating the costs of the mechanization fund, standing alone (as distinguished from an additional agreement to pass on these costs), does not come within the provisions of section 15 (Pet. App. 15a-17a). The court likewise sustained the Commission's ruling of no unreasonable prejudice or practices under sections 16 and 17, respectively. The court agreed that a generally reasonable method for assessing benefits is permissible even though it produces some

instances of burdens disproportionate to the benefits. It noted that the method adopted by PMA was a rough and ready way to divide the cost of the mechanization agreement; that it was some indicator of stevedoring activities; that while it had objectionable features these were considered to be less weighty than other methods which had been examined; that it was simple to administer, a matter of considerable importance; and that the method continued in effect what had been an established industry practice for the purpose of assessing dues and allocating other labor costs (Pet. App. 20a-25a).

ARGUMENT

The petition presents no substantial question warranting further review by this Court. There is no conflict between circuits, and the decision below—which is based on an exhaustive and painstaking opinion—is correct.

I

The Commission's Finding That PMA's Agreement Is Not Subject to the Filing and Approval Requirements of Section 15 Is a Rational One, and No Further Review Is Warranted.

Section 15 of the Shipping Act requires common carriers by water and other persons subject to the Act to file with the Commission for approval every agreement falling into one of seven categories, including any agreement "fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement." Upon approval, such an agreement is expressly exempt from the antitrust laws.

Carnation Co. v. *Pacific Westbound Conference,* 383 U.S. 213.

The Commission noted that the literal language of section 15 is broad enough to cover any "cooperative working arrangement" between persons subject to the Act (R. 673a-674a). Yet it would be neither good administration nor serve the statutory purpose of effective supervision of maritime trade practices to hold every cooperative arrangement within section 15. For such a holding would mean, the Commission pointed out, that agreements "to pool secretarial workers or share office space" for example, are subject to filing and approval (R. 674a). Such a holding may have a similar consequence for agreements which affect only labor-management relations. The Commission ruled, that unlike the situation which would have existed had the PMA members agreed to pass on a part or all of the increased labor costs to the public, the agreement among PMA members for allocating the costs among themselves, without more, has no direct impact upon outsiders and therefore does not fall within section 15 (R. 675a). The increased costs may or may not be reflected in higher rates the members charge for their services. While certain of the PMA members did increase their rates as a result of the assessment, others did not. The common carriers absorbed the assessment and some terminal operators apparently did so (R. 671a). Had none of the PMA members passed on the assessment, the agreement would have had no impact on third persons, direct or indirect. The line drawn by the Commission, we submit, is as clear as circumstances permit and makes for a more manageable ad-

ministration of the Act than would be a construction which includes all agreements, however indirect their impact and regardless of whether they pertain to ocean transportation.

Deferring to the Commission's expertise, "especially in view of the technical and specialized nature of the subject area over which it has jurisdiction," the court of appeals upheld the Commission's ruling as "a tenable one and not arbitrary or capricious . . . ." (Pet. App. 15a-16a). The decision below accords with this Court's teaching that "[w]here the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation," the court will give "great weight" to the agency's conclusion and the court's function is limited to determining whether the agency's decision "has warrant in the record and a reasonable basis in law." *Atlantic Rfg. Co.* v. *Federal Trade Commission,* 381 U.S. 357, 367-368; *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385; *Labor Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 130-131. This principle has also been applied in a variety of contexts under the Shipping Act. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303-307; *Persian Gulf Outward Frt. Conf.* v. *Federal Maritime Commission,* F. 2d C.A.D.C., No. 20,350, decided February 28, 1967; *Stockton Port District* v. *Federal Maritime Commission,* 369 F. 2d 380, 381 (C.A. 9), *cert. denied,* May 8, 1967, No. 1064, this Term; *Alcoa S.S. Co.* v. *Federal Maritime Commission,* 321 F. 2d 756, 759 (C.A.D.C.); *Trans-Pacific Freight Conf.* v. *Federal Maritime Commission,* 314 F. 2d 928,

935 (C.A. 9); *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277, 281 (C.A.D.C.).

Contrary to the suggestion implicit in petitioner's position, there is nothing in the legislative history to suggest that all agreements by persons subject to the Act, whatever the impact and whether or not they pertain to transportation, are within the scope of section 15 and may therefore be immunized from the antitrust laws. See, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade* (the *Alexander Report*), H. Doc. 805, 63rd Cong., 2d Sess. 415. The Commission has disclaimed any authority under the Act to grant shipping lines an antitrust exemption with respect to all agreements, including even some which may be trade-restraining. *Hearings Before House Judiciary Antitrust Subcommittee on Monopoly Problems in Regulated Industries,* 86 Cong., 1st Sess., pp. 17-18, 45. Thus, agreements between carriers "that they will buy bunkers from one oil company, or agreeing that they will not buy from a given company" are agreements "that would not be covered by Section 15" and would not be "in the area carved out from the antitrust laws" (*Id.*, at 45).[7]

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[7] Petitioner, in quoting a passage from the Commission's report to suggest that the Commission limited the scope of section 15 only to agreements between parties in direct competition with each other (Pet. 13), fails to point out, however, that the case cited by the Commission plainly indicates that the Commission intended no such restriction. For, *D. J. Roach, Inc.* v. *Albany Port District, et al.*, 5 F.M.B. 333, 335, the case cited (R. 674a), involved an agreement between persons subject to the Act who were not in direct competition—the Albany Port District, the lessor of a terminal, and a terminal operator, which leased the terminal.

Petitioner's recurring theme is that it is the victim of retaliatory action by a combination of common carriers dominating PMA because it ships its automobiles on privately chartered vessels (Pet. 8, 10, 15, 16, 20, 23). The Commission, however, indicated that it had not been shown on the record before it that the method of assessing automobile cargo resulted from a "design deliberately to burden" automobile cargo more than other cargo (R. 677a). In any event, as the court of appeals pointed out, if petitioner is the target of an agreement by the shipping lines in restraint of trade, such an agreement, without the Commission's approval, would not be protected from attack under the antitrust laws (Pet. App. 25a, n. 13).

II

The Commission Correctly Found That the Method of Assessing Automobiles Did Not Violate Either Sections 16 or 17 of the Act.

Whether a discrimination is undue or a practice is unreasonable is, of course, a question committed to the expert judgment of the Commission, based upon an appreciation of all the facts and circumstances affecting the traffic. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303-304. The Commission showed a full appreciation of all the facts and circumstances, expressly noting, *inter alia,* that the measurement basis for assessing automobiles resulted in an assessment almost ten times greater than did a weight basis ($2.35 per vehicle as against $.25); that although other cargo was assessed as manifested, vehicles were always assessed on a meas-

urement basis;[8] that while automobile cargo will probably receive only general benefits from the fund plan (such as freedom from strikes and slow downs), such cargo, unlike some other cargo, is unlikely to benefit from technological improvements in loading and unloading (R. 677a). The Commission nevertheless held that the difference in treatment could not be deemed unreasonable because while automobile cargo may not have benefited as much as other cargo, it did receive substantial benefits from the mechanization agreement and there is no statutory requirement of precise equivalence between service and benefits. Furthermore, the assessment reflected a reasonable business judgment resulting from a careful consideration of alternative methods of assessment and was patterned after the method of assessing dues for years (R. 668a-669a, 677a).

The court of appeals gave careful consideration to each of petitioner's charges of discrimination (Pet. App. 18a-25a) and concluded that they do not require reversal of the Commission's order. For, as the court pointed out in summary, "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits." (Pet. App. 24a-25a). The affirmance of the Commission's order followed the settled principle that Congress has entrusted the Commission with broad discretion in dealing with problems under the Shipping Act and that there being a rational basis

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[8] Unlike other cargo, which was usually manifested consistently either on a weight or measurement basis, however, automobiles were not uniformly manifested one way or another (Pet. 4a).

for the Commission's resolution of the problem, the court could not substitute its judgment for that of the Commission, *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485; *Swayne & Hoyt Ltd.* v. *United States*, 300 U.S. 297, 304; *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-621.[9]

Petitioner contends that the court of appeals sustained the Commission's determination of no unreasonable practices on grounds not considered by the agency (Pet. 24-27). A comparison of the Commission's report (R. 668a-678a) with the court's opinion (Pet. App. 19a-25a) shows that petitioner is mistaken. Petitioner's complaint may result from the fact that the court of appeals painstakingly scrutinized the record in order to resolve each of the many points raised by petitioner. Its conclusions and grounds, however, do not depart from those of the Commission's.

Petitioner can scarcely be heard to complain of the court of appeals' disposition of the section 16 issue. Before the Commission, petitioner had conceded that (1) a showing that competitive cargo (i.e., other automobile cargo) has been preferred was required to sustain a section 16 violation; and (2) such a showing could not be made. On that basis, the examiner and the Commission found no violation of section 16. In the court below, petitioner argued that no such showing

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[9] Petitioner is mistaken in suggesting that the Commission ruled that *only* maliciously motivated practices will bring section 17 into play (Pet. 23). The Commission's reference to a "design deliberately to burden" one form of cargo—obviously a response to petitioner's repeated charge that it was the target of retaliatory action by common carrier members of PMA—was to suggest that practices which are otherwise proper may violate the Act if done maliciously.

was necessary, citing *New York Foreign Freight Forwarders* v. *Federal Maritime Commission*, 337 F. 2d 289 (C.A. 2), *cert. denied*, 380 U.S. 910. The court below, upon upholding the Commission's ruling that the difference in treatment between automobile and other cargo was not unjustified and therefore not unreasonable within section 17, ruled that there was therefore no significant basis for the claim that petitioner is the victim of discrimination that is unreasonable under section 16. Accordingly, it found it unnecessary to consider petitioner's arguments based on the *New York Freight Forwarders* case. In any event, *New York Freight Forwarders* is not at all relevant. That case merely involved the power of the Commission to issue a "prophylactic disclosure" rule (337 F. 2d at 300), one which required freight forwarders to state separately their charges in billing customers so that "an informed shipping public will upon learning the factual details eliminate the discriminatory and unfair practices resulting from hidden charges for accessorial services" (*Ibid.*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Answer of Intervenor Pacific Maritime Association to Memorandum for the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1168

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Answer of Intervenor Pacific Maritime Association to Memorandum for the United States

The Solicitor General urges this court to grant certiorari to review the decision of the Court of Appeals for the District of Columbia. The Court of Appeals decision unanimously affirmed the Federal Maritime Commission (FMC) on the authority of this court's fundamental decision in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966).

The Solicitor General's brief contains many misstatements of fact that conflict with uncontroverted testimony,[1] and it asserts that many concessions have been made that are refuted by the briefs and opinions below. However, at this junction we direct the Court's attention to two fundamental misconceptions of fact upon which his entire position is predicated, neither of which "facts" are true or find any support in the record:

1. That the arrangements adopted by the members of an employer collective bargaining group to fund fringe benefits guaranteed in a collective bargaining agreement negotiated with the certified collective bargaining representative are unrelated to the collective bargaining process and the collective bargaining agreement and, therefore, present no question of labor relations (Solicitor General's brief, pgs. 2, 7-9), and

2. That the arrangements adopted by the Pacific Maritime Association (PMA) to fund the fringe benefits guaranteed by the ILWU-PMA Mechanization and Modernization Agreement were designed to *require* that the costs incurred by its stevedore members would automatically be passed on to shippers via higher charges for longshore services (Solicitor General's brief, pgs. 6-8).

These crucial factual conclusions are contrary to uncontroverted evidence and, equally importantly, are contrary to the conclusions of the FMC and the Court of Appeals.

The Supreme Court has, time and again, stated that it will not grant certiorari to review factual determination *unless* it clearly appears that the Court of Appeals in reviewing the agency decision

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1. A most flagrant disregard of the record is shown by the Solicitor General's statement that there had been no consistent practice as to whether automobiles are manifested on a weight or measurement basis. The Trial Examiner in Finding 9, particularly footnote 11 thereto, found that "at all times here involved automobiles were considered measurement cargo in foreign commerce." (R 621a.) That finding is supported by substantial evidence. (R 110a-111a, 218a.) The Trial Examiner also noted that Volkswagen cargoes carried under charter where the entire ship was hired by petitioner were manifested on a unit basis, since neither measurement nor weight is relevant when cargoes are carried under charter arrangements involving full shiploads. (R 621a-622a *cf.* R 99a, 100a, 110a, 112a, 217a-218a.)

has "grossly misapplied" the substantial evidence rule.[2] The Solicitor General is now in the surprisingly novel position of asking this court to grant certiorari when the findings, supported by *uncontroverted* evidence, demonstrate that the factual premises upon which his argument rests are false.

I. The Method Adopted by the Pacific Maritime Association to Raise the ILWU-PMA Mechanization Fund Implements and Is an Integral Part of the Collectively Bargained ILWU-PMA Mechanization and Modernization Agreement.

The agreement attacked in the Solicitor General's brief was negotiated by Mr. Paul St. Sure, President of PMA, and by Harry Bridges, President of the ILWU. Mr. St. Sure was, prior to his death in 1966, probably the single most experienced management negotiator on the Pacific Coast. His experience ranged over many industries and he was respected by management and labor alike. (R 179a, 181a-183a.)

Mr. St. Sure's uncontroverted testimony was that industry-wide fringe benefit programs are commonly negotiated whereby the employers "agree to guarantee a set of benefits", reserving the right to determine the method of funding the benefits. (R 215a.) Mr. St. Sure also made clear that this method is an indispensable part of the collective bargaining negotiations because the ILWU, which serves as joint trustee of the Mechanization Fund, is "alert as to whether or not the method" is working; it considers itself entitled to the money "to spend in accordance with the Agreement." (R 211a.)

Not surprising, therefore, was Mr. St. Sure's testimony that not only did the negotiation with the ILWU encompass consideration of the various methods of funding fringe benefits (R 206a-

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2. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951) (companion case); see also *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 69 (1961); *FTC v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 410 (1952).

209a), but in fact the ILWU proposed that contributions to the Mechanization Fund be made under a tonnage formula identical with that ultimately adopted by the PMA members. (R 209a-210a.) This proposal was rejected, according to Mr. St. Sure, because the negotiators were "fearful that if by contract we agreed to a tonnage tax that this would become a contractual formula which would persist beyond the five year term." (R 210a.) The ILWU was persuaded to accept, in lieu of a fixed sum per man hour or a fixed sum per ton handled, a lump sum of $29,000,000 which had been ascertained to be the amount actuarially necessary to provide the negotiated benefits. (R 206a-207a, 221a-222a.)

Mr. St. Sure's testimony makes clear that, having agreed with the ILWU on the scope of benefits, good faith bargaining required prompt collection of the fund by PMA members under an administratively feasible formula. (R 211a, 216a-217a.) PMA staff committees thereafter studied the problem of implementing the Mechanization Agreement and finally recommended as the most reasonable method the one proposed by ILWU during negotiations. (R 209a-210a; Ex. 5A at pg. 466a-474a.) The ILWU-PMA Mechanization and Modernization Agreement was submitted to vote by PMA members *concurrently* with the PMA staff committee recommendations that employers of dockworkers should contribute to the Mechanization Fund on a tonnage basis calculated to assure collection of the sum promised ILWU. (R 216a.) The basic PMA-ILWU agreement and the funding plan were thus ratified simultaneously. Mr. St. Sure's testimony is unequivocal: the funding method and the ratification of the contract were considered concurrently because it was recognized by all the interested persons that they were a *single contractual obligation.* (R 216a, 230a.)

In the face of this testimony, from one of the nation's respected experts on the collective bargaining process, it is incredible that the Solicitor General can assert that the method employed in providing funds necessary to finance employee benefits guar-

anteed by the Mechanization Agreement "is not a part of that contract and involves no question of labor relations." (Solicitor General's Brief p. 8.) To reach this conclusion the Solicitor General is required to misstate the record by asserting that "the union ultimately disclaimed all interest in how the fund would be raised." (Solicitor General's Brief, pg. 2.) Again the undisputed evidence is to the contrary:. Mr. St. Sure testified that ILWU maintained "a continuing interest and continuing concern as to whether or not the collections under the fund were being met." (R 211a.) When asked whether ILWU was unconcerned as to the specific method adopted to assure such collections, Mr. St. Sure made clear that PMA could not fund the Mechanization Plan by a method that could disrupt the industry. He stated at page 212a of the Record:

> I am quite sure that if any agreement had been reached which would have brought about such a result, we would have an obligation, and I am sure the union would insist upon it, to reopen the bargaining and to resume the bargaining as to the means by which the funds were to be collected.
>
> After all, this was a continuing relationship that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations.

None could argue that Mr. St. Sure has misconceived the rights of ILWU and the duty of PMA. It is too elementary to require citation that employers are required to bargain in good faith with the unions, and that formal terms of a contract cannot be used to destroy the heart of a bargain. Any labor negotiator or labor lawyer would recognize immediately that the funding of employee benefits necessitates, as an elementary concept of good faith, a recognizable and workable agreement. Unfortunately, the Solicitor General, having no jurisdiction over the national labor laws, is apparently unacquainted with these elementary principles.

We submit the above uncontroverted evidence dictates a conclusion that the Solicitor General's view of the relationship of the funding method to the ILWU-PMA contract must be rejected; funding *was*, to all concerned, part and parcel of the ILWU-PMA Mechanization Agreement.

We also submit that it is the Solicitor General, and not the Commission or Court of Appeals who is "blinking at reality" and elevating form over substance—it is implicit in the Solicitor General's brief that if the method ultimately adopted by the PMA membership had been included *in haec verba* as a provision of the ILWU-PMA Mechanization Agreement, then no question could have been presented under the Shipping Act, 1916, and the entire arrangement would only then constitute a collective-bargaining agreement. How or where the Solicitor General finds authority or reason for this astonishing conclusion we cannot imagine. This is bootstrap legality, and the Solicitor General's view would force parties to parrot every nuance of their negotiations in written form, simply to assure the protection of "collective bargaining agreement" status. To require such embellishment and specificity, where in fact the best bargaining interests of the parties often demand flexibility, is to create paper shibboleths in place of bargaining realities. We had thought that the day of the importance of waxen seals was long past. We can only conclude that the Solicitor General does not think so; we trust that this Court will not agree with him.

II. Labor Costs Resulting from PMA's Implementation of the Mechanization Agreement Were Not Automatically Shifted to Customers of Stevedores.

The heart of the Solicitor General's position (Solicitor General's Brief at 6-8, particularly fns. 6-7) is a premise that increased wage and fringe rates must result in increased prices. The premise assumes that the costs of funding the Mechanization Fund must necessarily have reduced the stevedore's normal profits, and that to recover these "lost" profits, the PMA members must have

passed the mechanization cost on to carriers and shippers through increased rates.

This result is not compelled by logic, and it is here refuted by fact. Increases in wage rates and fringe benefit costs do not necessarily cause an increase in overall labor costs. The facts, established by uncontroverted testimony, disclose that stevedore rates negotiated by petitioner were lower after 1961, notwithstanding that wage rates and fringe benefit costs increased.

1. INCREASED WAGE RATES AND FRINGE BENEFIT COSTS DO NOT NECESSARILY CAUSE AN INCREASE IN TOTAL LABOR COSTS.

Stevedoring is a service industry. Consequently, the single largest cost affecting stevedore rates is labor. We do not deny that stevedore contractors, like other businessmen, must recover their overall labor costs through their charges to customers or go out of business.

Stevedore contractors work under contracts privately negotiated with their customers. (R 126a-127a, 141a, 162a.) The form of the contract may take many different shapes. The most common method to calculate stevedore rates is a commodity rate, but that rate like all other stevedore charges is essentially a cost-plus fee. (R 126a-127a, 220a.) In negotiations with his customer the stevedore spreads his estimated cost items before his customer; they bargain over the efficiency in loading or unloading which can be achieved given these cost items. (R 145a.)

Thus negotiation of a commodity rate involves figures on wage scales, costs of fringe benefits (pensions, welfare, vacations, and mechanization) as well as overhead items such as insurance and clerical and managerial services. (R 127a.) Obviously the costs of the Mechanization Plan, accepted by PMA in exchange for ILWU's acceptance of labor saving cargo-handling operations, were among the many costs included within the mix and ultimately reflected in the commodity rate. (R 127a, 154a.)

It does not follow, however, that such inclusion would necessarily increase the commodity rate. The Solicitor General appears to believe that an increase in the commodity rate could be avoided

only by a reduction in the contractor's profit; hence he asserts illegality because the cost of the mechanization benefits incurred by petitioner's stevedores exceeds their profits. The Solicitor General does not recognize that the commodity rate can be reduced, although the mechanization cost is included in the mix, if the contractor through increased efficiency can reduce other more important labor costs such as direct wages and other fringe costs. Being unschooled in the operations of the stevedore industry and having disregarded the record as a whole, the Solicitor General cannot appreciate this truism, recognized throughout the industry. As Mr. St. Sure testified:

> Well, the whole purpose of the agreement was to improve the efficiency of longshore operations which in turn means to reduce the cost of handling cargo and provide a more efficient operation which, in turn, relates to the faster turn-around time of ships.
>
> We expected to reduce our direct labor costs, both on the average and in detail. By that I mean direct labor costs that the stevedore or the terminal operator had to pay out by having less manhours to pay for.
>
> We likewise expected that, if there was a saving, that this would have some direct benefit to his stevedore and his relationship to his customer as to whatever bargain he made with them, and we assumed, also, that the carriers would probably be aware of the fact that savings were being made, and might sharpen up their pencils in bargaining with the stevedore. (R 219a.)

The Solicitor General's error results from dogmatic acceptance of the premise that increased labor rates always require increased labor costs and, therefore, higher prices. This premise was the basis for early attempts to limit the development of unions. It was then asserted that strong unions would result in a restraint on competition, because uniform wage rates would necessarily cause uniform labor costs and, therefore, uniform prices. This reasoning was first rejected by Congress in the Clayton Act when it declared that labor was not a commodity of commerce.[3] It was

3. Clayton Act, section 6, 15 U.S.C. § 17.

finally laid to rest by this Court in the landmark decision in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1939).

The premise rejected in *Apex Hosiery* was revived in a new form during the nationwide debate over the effect of industry-wide bargaining. Some urged Congress to prohibit industry-wide bargaining on the ground that identical industry-wide wages restrained competition; the argument was rejected.[4] Former Solicitor General Archibald Cox, today's foremost labor authority, has exposed the fallacy in the assumption that the existence of uniform labor rates in an industry necessarily results in price-fixing:

> Reality departs from the model. Changes in hourly rates do not have the same uniform effect on total costs because of variations in the ratio of labor costs to total costs, in the efficiency of plant, equipment and management and, at least theoretically, in the productivity of labor. The variation would be even wider in an industry where some workers receive piece rates, some are paid hourly rates and still others work under bonus systems. Furthermore, management has shown amazing skill in reducing the cost of wage increases through new machinery, improved engineering and like economies.[5]

The present Solicitor General's views are a variant of the discarded premise concerning the effect of uniform industry-wide wage scales and fringe costs on competition. He has closed his eyes to the uncontradicted testimony that the purpose of the Mechanization Agreement was to reduce direct wage and fringe costs by elimination of the featherbedding which had inflated such costs exorbitantly. He has closed his eyes to the fact that the method adopted by PMA to implement the Mechanization Agreement was designed to further that purpose. The record shows that no carrier dependent upon services of stevedores participating in and bearing the cost of the Mechanization Plan has increased its rates as would be expected if PMA funding arrange-

---

4. Cox, *Labor and the Anti Trust Laws—A Preliminary Analysis*, 104 U. Penn. L. Rev. 252, 275 (1955).

5. *Id.* at 278.

ments were designed to shift such costs to the customers of stevedores. (R 125a-126a.) Nor did marine terminals increase their rates, notwithstanding that they, like stevedores, incurred costs under the Mechanization Agreement.

In the face of this record, we simply cannot understand the Solicitor General's view that the Court of Appeals has grossly misapplied the substantial evidence rule in affirming the FMC determination that the funding arrangements were *not* designed to pass on to carriers and shippers the stevedore's costs of participation in the Plan.

2. THE COSTS OF THE MECHANIZATION PLAN INCURRED BY PETITIONER'S STEVEDORES WERE NOT DESIGNED TO BE SHIFTED TO PETITIONER.

Uncontroverted testimony discloses that petitioner renegotiates its stevedore contracts every year. (R 155a, 167a.) It does so because it seeks a lower commodity rate as a consequence of increases in productivity resulting from increases in efficient operations. (R 143a, 155a, 162a.) The ILWU-PMA Longshore Contract concluded in 1960 and effective during 1961 and 1962 resulted in increases in wage rates, welfare assessments, as well as imposition of costs to fund the Mechanization Plan. (R 201a-202a.) *Yet the commodity rate negotiated by petitioner with its stevedore contractor Marine Terminals for operations subsequent to these increases in rates was less than the commodity rate charged prior to such increase in wages and fringes.* (R 155a, 162a.)

The uncontroverted testimony makes clear why the commodity rates were reduced despite substantial increases in wages and fringe benefits: overall labor costs to unload a ship were reduced because more cargo could be put out per dollar of labor cost even under such increased rates. (R. 143a-144a.) Furthermore, cargo handling devices were introduced to reduce the risk of damage to cars (R 144a, 147a-148a); this mitigation of risk should lead to a decrease in insurance costs thus lowering a cost item reflected in the commodity rate. (The testimony is clear that ILWU, prior to adoption of the Mechanization Agreement, "simply resisted anything which the employer introduced" re-

gardless of whether safety or reduction of work opportunities were involved. (R 222a-224a.))

Moreover, a one-man reduction in the size of the stevedore gang required on petitioner's operations was achieved after the Mechanization Agreement was adopted; significantly, petitioner's stevedore admits this gang member was theoretically not required under earlier work practices, but maintenance of the status quo indicated the wisdom of not seeking elimination of an unnecessary employee. (R 157a-158a.) Finally, a material change in attitude resulting in the ending of "wildcat strikes" and "slowdowns" (R 159a) and mitigating the risks of "dead time" that can involve a "substantial amount of money" (R 162a) was achieved by the PMA implementation of the Mechanization Agreement. These are the factors that reduce overall labor and other costs of petitioner's stevedores to permit a reduction in their rates.

The Mechanization Agreement had been negotiated to afford an opportunity to secure such reductions in the stevedore costs. (R 224a-225a, 230a-231a.) The testimony of the Chairman of the Funding Committee makes clear that PMA, which consists of stevedores, marine terminals and ocean carriers, would not realistically be so foolish as to fund the Mechanization Agreement by a method that would *require* the stevedores to shift the mech fund assessments to their carrier customers; to do so would have given 100% of the economic advantage from the Mechanization Agreement to stevedores by allowing them to pocket the savings from the opportunity of operating efficiently. (R 126a-127a.) This is the substantial uncontroverted evidence that supports the FMC determination and Court of Appeals affirmance that PMA members did not agree or intend that the mechanization contribution be shifted on top of stevedore charges by them to their customers.

Moreover, the record discloses that petitioner believes it should enjoy these lower overall labor costs without paying for them:

When petitioner's stevedore contracts were reopened in 1961 for renegotiation, petitioner refused to consider costs incurred

by its stevedores in order to secure efficient operations. (R 154a-155a.) When petitioner's stevedores even offered to reduce their profits and absorb a portion of the costs, petitioner did not bother, its Pacific Coast representative proudly testified, to acknowledge the offer. (R 172a-173a.) Nor did petitioner seek to employ any other stevedore, although there were others in the area who were not members of PMA. (R 173a.) Petitioner's representative was satisfied with the quality of his stevedore's operation (R 173a), but was determined that the stevedore should work at rates determined by petitioner.

Because of this impasse petitioner's stevedores continued to work under earlier commodity rates and, apparently, billed separately their costs arising from the Mechanization Agreement. (R 155a.) This adamant refusal of petitioner to negotiate now misleads the Solicitor General into suggesting that PMA intended that the mechanization charges would be added by stevedores on top of their commodity rates as a special charge. Uncontroverted testimony discloses that this was neither the intent nor the practice of PMA members (R 126a). On the contrary, stevedore contracts were canceled and renegotiated with all labor costs, including mechanization costs, before the parties; the purpose of the renegotiation was to lower and not raise stevedore commodity rates. (R 126a-127a.) Thus, when petitioner observed that its productivity was increasing, negotiation with its stevedore of the latter's commodity rate was reopened by petitioner and a lower commodity rate resulted in 1962 and later. (R 155a, 162a.)

We submit that the Solicitor General, by urging certiorari be granted in this case, is undermining the force of the Court's recent decision in the *Consolo* case. This necessarily results in the Solicitor's urging a view on this Court that disregards uncontradicted testimony and the record as a whole. Moreover, by challenging the PMA action implementing the only collective bargaining agreement to sweep out of an entire industry exorbitant featherbedding costs, the Solicitor General urges upon this Court a policy which would discourage negotiators from developing their own

solutions for industrial labor management problems in the collective bargaining process.

Petition for certiorari should not be granted.

Dated May 30, 1967.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1168

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

I.

The Solicitor General's disinterested concurrence in our petition for certiorari is challenged by the Pacific Maritime Association ("PMA") as "predicated" upon "two fundamental misconceptions of fact" (PMA 2).* These "misconceptions" are asserted to be contrary to

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* "PMA" when enclosed in parentheses refers to the "Answer of Intervenor Pacific Maritime Association to Memorandum for the United States"; "SG," to the "Memorandum for the United States"; and "FMC," to the "Brief for the Federal Maritime Commission in Opposition". As before, "R" refers to the Joint Appendix printed for the court below.

conclusions of the Federal Maritime Commission and the Court of Appeals insulated from review under the substantial evidence rule.*

Each step of this syllogism is vulnerable. The Solicitor General had not misconceived the facts; neither of the two factual issues raised by PMA entered into the decisions below; and the sole relevant finding to which the substantial evidence rule applies is adverse to PMA. Finally, neither issue is fundamental; both are, at best, peripheral.

A.

The Solicitor General is charged with failure to understand that PMA's tonnage tax was "part and parcel of the ILWU-PMA Mechanization Agreement" (PMA 6). In fact, the question of how the Fund was to be raised was deliberately excluded from this collective bargaining agreement at the insistence of PMA (Ex. IC, pp. 7-8; R. 284a). As the Commission found, "The method of collecting the

---

* Further to discredit the Solicitor General's thoughtful analysis, PMA advises the Court that his memorandum "contains many misstatements of fact." A single example, described as involving a "most flagrant disregard of the record" (PMA 2 n. 1), is cited, *i.e.*, the statement that in manifesting automobiles there is no consistent practice regarding the use of weight or measurement (SG 3). Compare this "flagrant disregard of the record" with the Commission's findings on this score:

> "There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight." (R. 669a-670a).

fund from the PMA membership was reserved to PMA" (R. 668a).*

Accordingly, when the Solicitor General states (SG 7) that he recognizes "an exception [from section 15] for agreements that relate solely to collective bargaining or labor relations," he is declaring policy, not addressing the facts of this particular case. Whether or not such an exception exists is not raised by this record.

Exploiting the Solicitor General's policy statement, PMA argues that it would have had to do no more than incorporate *in haec verba* the funding arrangement here involved into its agreement with the union to immunize such arrangement from scrutiny under section 15. It accuses the Solicitor General, therefore, of elevating form over substance (PMA 6).

To answer: First, union consent is by no means an empty formality, *i.e.*, "waxen seals," as PMA suggests. Responsible representatives of labor do not readily lend their authority to inequitable arrangements. Thus, it is meaningful to distinguish between, on the one hand, a cooperative arrangement among competitors serving purely their business interests and, on the other, an industry-wide plan arrived at as a result of collective bargaining.

Second, the agreements that the Solicitor General would exclude from Commission supervision are those "that relate *solely* to collective bargaining or labor relations" (em-

* In an attempt to undercut this finding, PMA quotes at length from the testimony of its late President, Mr. St. Sure (PMA 5). Excised, however, is what is most significant in this evidence: that both Mr. St. Sure and his counsel unquestioningly assumed that PMA could exercise its taxing power, to abolish "whole segments of the industry" (R. 212a). Furthermore, even if PMA had gone to this extreme, the union could have done nothing, under the terms of its collective bargaining agreement; its sole recourse, as Mr. St. Sure implicitly recognized, would have been to reopen negotiations.

phasis supplied). It does not follow that he would take a similar view of contracts which comprehend additional matters. In any event, in our view, even if the Mech Fund were part of a collective bargaining agreement, which it clearly is not, the Commission's jurisdiction under section 15 would in no way be affected, exactly as the Examiner ruled (R. 649a-650a). "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

B.

The second factual point which PMA insists the Solicitor General misunderstands is the impact of the Mech Fund plan upon shippers (PMA 2). The thrust of PMA's argument appears to be that stevedoring charges for particular cargo have not necessarily increased dollar for dollar to match the PMA assessment (PMA 6-12).

But whether rates go up or down because of changes in other elements of cost, customers are necessarily affected by the creation of a new and artificial charge which must be recovered in the price. If petitioner is obligated to make a disproportionate contribution to the Fund, it has been adversely affected even if it pays less than it did formerly, since it has been denied the full benefit of increased labor efficiency. PMA itself acknowledges that "the costs of the Mechanization Plan * * * were among the many costs * * * ultimately reflected in the commodity rate" (PMA 7). The Solicitor General assumes nothing more (SG 6-7).

II.

In opposing our petition for review, the Commission and PMA show how unintelligible is the construction they defend and how essential the need for clarification by this Court. The Commission's contradictory and inconsistent opinion leaves unclear whether the test of a section 15 agreement is its impact upon "carriers and shippers" or upon "outsiders," that is, persons not parties to the agreement (R. 675a).

PMA reads the opinion the first way and argues the facts accordingly. What the Commission determined, PMA says, is that "the funding arrangements were not designed to pass on to carriers and shippers the stevedore's cost of participation in the Plan" (emphasis omitted) (PMA 10). Some of the evidence relied on by PMA as supporting this determination is testimony that PMA, "which consists of stevedores, marine terminals and ocean carriers, would not realistically be so foolish as to fund the Mechanization Agreement by a method that would require the stevedores to shift the mech fund assessments to their carrier customers * * *" (emphasis omitted) (PMA 11). Thus PMA presupposes that the Commission excluded its arrangement on the theory that it affected neither carriers nor shippers.

On the other hand, counsel for the Commission apparently believes the Commission's ruling excluding the PMA agreement from section 15 rested on a finding that it had "no direct impact upon outsiders" (FMC 13). That PMA's carrier members were affected is assumed. In fact, it is urged in support of the Commission that these "common carriers absorbed the assessment" (*ibid.*). PMA's agreement is described as one "among ocean common carriers and marine terminal operators to allocate among themselves the industry labor cost of a collective bargaining agreement" (FMC 2). The question presented, according

to Commission counsel, is whether such an agreement was properly excluded from section 15 (*ibid.*).

In short, two of the most interested parties in this proceeding are wholly unable to agree on how either factually or legally the Commission concluded PMA's cooperative working arrangement to be outside the Shipping Act. It is ironic, therefore, that this Court is urged to accept that agency's construction of section 15 in the interests of "manageable administration" and as drawing a line "as clear as circumstances permit" (FMC 13-14). Our opponents underscore the urgent need for clarification of the issues of transcendent public importance here involved.

Dated: June, 1967.

Respectfully submitted,

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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1967

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 779–801) is reported at 371 F. 2d 747. The report of the Federal Maritime Commission (R. 666–728) is printed at 9 F.M.C. 77.

JURISDICTION

The judgment of the court of appeals (R. 802) was entered on December 22, 1966. The petition for a writ of certiorari was filed on March 20, 1967, and was granted on June 12, 1967. (R. 803). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a) (Supp. II).

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are printed in the Appendix, *infra*, pp. 43–46.

QUESTIONS PRESENTED

An employers' association, consisting of the ocean carriers, terminal operators and stevedore contractors serving the West Coast ports, entered into a collective bargaining agreement with the longshoremen's union. The agreement called for the creation by the employers—by whatever method they chose—of a $29 million fund for the protection of longshore employees displaced by mechanization of the docks. The association's members subsequently agreed among themselves that each employer would be assessed its contribution to the mechanization fund under a formula based on tonnage handled. Foreign automobiles were assessed much more heavily than other forms of cargo and terminal operators handling Volkswagen automobiles could not absorb the heavy assessment and passed it on to Volkswagen. The questions presented are:

1. Whether the implementation of the employers' arrangement for allocating the cost of the mechanization fund among themselves is unlawful because their agreement was not filed with the Federal Maritime Commission under Section 15 of the Shipping Act.

2. Whether the Commission failed adequately to consider Volkswagen's charge that the automobile assessment unduly or unreasonably prejudiced or disadvantaged it, in violation of Section 16 of the Act,

or was an unjust or unreasonable practice, in violation of Section 17.

STATEMENT

The relevant facts, as set forth in the initial decision of the Commission's hearing examiner (R. 612–656) and in the Commission's report (R. 666–678) are largely undisputed.

1. THE PARTIES

Petitioner, the manufacturer of Volkswagen automobiles, is one of the largest users of the West Coast ports of the United States, importing through them more than 40,000 Volkswagen vehicles each year. Of these, about 75 percent are transported on vessels chartered by petitioner; the remainder are transported on common carriers (R. 614).

Respondent Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles ("Marine Terminals") operates as a stevedoring contractor and as a marine terminal operator serving both common carriers and contract carriers. It assumes responsibility for moving cargo from the vessel to a point of storage in the terminal and performs related clerking, sorting and checking services. It has performed these services for petitioner since 1954 (R. 614–616). About 90 percent of the automobiles handled by Marine Terminals at San Francisco and Los Angeles are Volkswagens (R. 669). When this controversy arose, Marine Terminals was being paid by petitioner at the rate of $10.45 per vehicle for the entire package of labor and services; its profit margin was $1.00 or less (R. 144–146). Because of improve-

ments to shipboard equipment, the unloading of automobiles in recent years has involved relatively efficient and modern procedures and has been relatively free of "featherbedding" practices (R. 633).

Respondent Pacific Maritime Association ("the Association") is an association of some 120 carriers, stevedoring contractors, and terminal operators (including Marine Terminals), serving West Coast ports. Shippers, such as petitioner, are not eligible for membership. The Association's primary function is to negotiate and administer collective bargaining contracts with the International Longshoremen's and Warehousemen's Union covering both the onshore employees of the stevedoring contractors and terminal operators and the offshore employees of the carriers, this case concerns only the former. Under the Association bylaws, each member is bound by its approval of a union contract (or any other contract imposing personal liability) unless it resigns from the Association within seven days of the vote approving the contract (R. 617).

2. THE ESTABLISHMENT OF THE MECHANIZATION FUND

Late in 1960, the Association agreed with the union that it would create a "Mechanization and Modernization Fund." The agreement on the fund, formalized in a collective bargaining agreement between the Association and the union signed in 1961 (R. 279),

represented what was hoped to be the solution to serious problems of long standing—the opposition of the union to the introduction of labor-saving devices and to the elimination of featherbedding practices, periodic work slowdowns and stoppages, and an environment of hostility between management and labor on the docks. The Association undertook to create over a period extending from 1961 through 1966 a trust fund of $29 million (including $1.5 million raised at an earlier point in the negotiations as a sign of good faith) to be used for paying certain benefits to the employees. The agreement specifically reserved to the Association the right to choose a method for collecting the necessary amounts from its members, and to change that method as it saw fit (R. 620). The union, for its part, agreed to eliminate some specific restrictive work practices and to accept a procedure whereby the employers could introduce changes in the traditional methods of handling cargo subject to prior consultation with the union and, in the event of dispute, arbitration.

3. THE ASSESSMENT FORMULA

Even before the mechanization fund was fully worked out with the union, the Association began exploring methods for allocating the cost among its members. In January 1961, a Work Improvement Fund Committee issued a report discussing five possible methods of allocation (R. 466–474). A majority of the committee recommended adoption of a formula assessing stevedoring contractors according to

the number of "revenue tons" of cargo handled. The proponents argued that a tonnage (as opposed to man-hour) assessment would assure that the stevedoring contractors who, by introducing the labor-saving devices, caused the greatest loss of employment would still contribute substantially to the fund (R. 468–469). A minority of the committee recommended that the cost of the fund be allocated under a combination of formulas, already used to allocate Association dues: part according to the number of revenue tons loaded or unloaded, and part according to the number of man-hours of labor employed (R. 475–479). The Association's membership adopted the majority recommendation. Following the practice used in assessing Association membership dues, the tonnage rate for bulk cargo was set at one-fifth of the rate for general cargo. Dividing the amount which had to be raised by the estimated revenue tonnage of cargo, the Association's Board of Directors set an assessment rate (later modified in minor respects not material here (R. 637)) of 27½ cents per revenue ton of general cargo and 5½ cents per revenue ton of bulk cargo (R. 624).

A revenue ton is an artificial measure used in computing freight rates for ocean shipping. It is measured either on a weight-ton basis (2,000 lbs.=1 ton) or a measurement-ton basis (40 cu. ft.=1 ton). The Association decided that "tonnage declarations by companies are to be made in exactly the same manner as manifested and reported to the Association for dues purposes during the year 1959" (R. 625). However, the practice with respect to the mani-

festing of automobiles was not uniform. On charter vessels they were manifested on a unit basis showing weight and sometimes measurement also. On common carriers—whose tariffs are on a unit basis—both weight and measurement were shown. And in the coastwise trade automobiles were manifested and freighted by weight (R. 670).

Accordingly, there was confusion among the Association's members as to whether automobiles should be assessed on a weight-ton or measurement-ton basis. In February 1961, the Association advised its members that reports of tonnage dues on automobiles should always be made on a measurement basis (R. 524). The same month, an Association committee report declared that the "Mechanization Fund assessment for autos should be on a measurement ton basis, regardless of how manifested" (Ex. 44, R. 691).

4. THE OBJECTIONS TO THE AUTOMOBILE ASSESSMENT

The average Volkswagen vehicle measures 0.9 tons by weight and 8.7 tons by volume. On a weight basis, the assessment on Volkswagen would average 25 cents per vehicle. On a volumetric basis, the assessment would average more than 10 times as much—about $2.35 per vehicle. The assessment thus increased the cost of unloading Volkswagens by an average of more than 20 percent (R. 626, 670),[1] compared with an

[1] There are several sizes of Volkswagen automobile, including a small "bug-shaped" sedan and a larger box-like vehicle known as a transporter. Unloading costs of the former were estimated to have increased 22 percent, and of the latter 31 percent (R. 512).

average increase of 2.2 percent for other cargo. No other commodity was so drastically affected by the assessment as automobiles (R. 482, 627–628). The volumetric assessment could not be absorbed by the stevedoring contractors, since, as mentioned, at existing rates their average profit per vehicle was only one dollar (R. 640, n. 27).

At about the time that the general membership of the Association approved the assessment formula, officials of Marine Terminals met with officials of the stevedoring contractors who handle the unloading of petitioner's cars in other West Coast ports. It was the consensus of the group that the company doing the discharging would be unable to absorb the contribution if it was assessed on a measurement basis (R. 626–627) and that they would have to pass on the assessment to petitioner. Shortly after January 16, 1961, Marine Terminals began adding to its statement of charges to petitioner an amount for the mechanization fund computed on a measurement-ton basis (R. 627). Petitioner refused to pay Marine Terminals this additional charge.[2]

Marine Terminals objected to the Association that the assessment of automobiles on a measurement-ton basis was unfair, arbitrary and without foundation in industry practice. It suggested a unit method of assessment (R. 630, 670). The Association rejected the protest. Volkswagen also protested to the Asso-

[2] At one point, Marine Terminals made an offer to petitioner to absorb a portion of the assessment equal to what it would have been on a weight-ton basis, but the offer was rejected (R. 627).

ciation. In a letter of January 17, 1961, petitioner's agent complained that the assessment placed a discriminatory burden on automobiles, that the automobiles transported on its chartered vehicles were consistently manifested on a unit basis rather than a measurement basis, and that the volume measurement of the automobiles had no relevance to the cost of unloading them (R. 484–485). Volkswagen's protest was considered by a committee charged with responsibility for overseeing operation of the assessment procedure and recommending improvement; the protest was rejected. Without any specific discussion of petitioner's objection to the measurement-ton formula, the committee stated only that the unloading of automobiles had a low "labor content" (although it was still susceptible of some future improvement), and that "save for the traditional exception of bulk cargoes, there should be no special adjustment of the tonnage assessment by commodity" (R. 488).

In May 1961 the committee requested suggestions from Association members on methods of improving or changing the assessment method, and Marine Terminals, along with several other Volkswagen unloaders, urged that a unit rate be established for automobiles. Representatives of petitioner and its stevedoring contractors met with the committee in November 1961. Apparently the Association considered possible modifications of the measurement-ton formula (such as setting a maximum limit to the assessment on a measurement-ton basis at five times the assessment on a weight-ton basis (R. 515)), but

in March 1962 it informed petitioner that its protest had again been rejected (R. 629–630).

Although the Association declined to make any changes in the assessment of automobiles, it did from time to time make changes in the assessment of other commodities (scrap metal, and logs and lumber moving in the coastwise trade) to remedy alleged inequalities. The modification of the assessment rate for lumber[3] was apparently influenced by the inability of the industry to bear the full assessment under the original formula (R. 502–504).

5. THE SUIT AGAINST PETITIONER AND THE REFERENCE TO THE COMMISSION

In December 1961 Marine Terminals, which had characterized itself as "only a collection agency" in this matter (R. 486), requested authorization from the Association to sue petitioner for the unpaid mechanization fund assessments (R. 634). At a meeting of December 13, the board of directors determined to give Marine Terminals legal and moral support if such an action were started and to have the Association participate directly in it (R. 634). In July 1962, however, the board modified this decision to provide that the Association would assist Marine Terminals only to the extent that there were issues raised in an action by it against Volkswagen which might jeopardize the mechanization fund (R.

[3] Lumber is assessed under a special tonnage formula (1,000 bd. ft.=1 ton). In July 1962 the rate on coastwise lumber was reduced to 5¢ per ton because of special penalty rates applicable only to lumber (R. 631a).

634). Volkswagen's failure to pay the assessment was evidently regarded as posing a serious threat to the continuation of the fund (R. 517–518). While the Association decided not to attempt to proceed directly against Volkswagen, it recognized that Marine Terminals and the other stevedoring contractors could not realistically be expected to pay the assessment on automobiles unless they, in turn, had an effective method of obtaining reimbursement from petitioner (R. 504, 507–508, 518).

In August 1962, the Association decided to sue Marine Terminals for the latter's failure to pay the assessments on automobiles handled by it, and brought a libel in the United States District Court for the Northern District of California against Marine Terminals. Marine Terminals admitted all of the allegations of the complaint and impleaded Volkswagen as a third party defendant, charging that Volkswagen had failed to pay Marine Terminals' unloading charges in full (*i.e.*, including the mechanization fund assessment). On Volkswagen's motion, the district court stayed the action while it invoked the primary jurisdiction of the Federal Maritime Commission (see *United States* v. *Western Pacific R. Co.*, 352 U.S. 59) to decide the following issues (R. 671–672):

> 1. Whether the assessments claimed from Volkswagen were being claimed pursuant to an agreement or understanding that is required to be filed with, and approved by, the Federal Maritime Commission under Section 15 of the Shipping Act before any step to implement it could lawfully be taken.

2. Whether the assessment claimed from Volkswagen would subject its automobile cargoes to undue and unreasonable prejudice or disadvantage, in violation of Section 16 of the Shipping Act.

3. Whether the assessments claimed from Volkswagen constitute an unjust and unreasonable practice, in violation of Section 17 of the Act.

Volkswagen then filed a complaint with the Commission against Marine Terminals; the Association intervened; and the Commission conducted a full hearing.

6. THE DECISIONS OF THE COMMISSION AND THE COURT OF APPEALS

The hearing examiner dismissed the complaint and, with two dissents, the Commission affirmed. 9 F.M.C. 77. The majority of the Commission held that the arrangement among the Association's members for allocating the assessment among themselves was not an agreement subject to Section 15 of the Shipping Act because it did not involve "practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives." (R. 674.) "What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators." (R. 675.) It found no such agreement.

The Commission concluded that Section 16 had not been violated because competitive cargo—other auto-

mobiles—had not been preferred (R. 676). As to Section 17, it did not consider whether the Association was guilty of an unreasonable practice in the method of computing the assessment, but confined its discussion to the reasonableness of Marine Terminals' passing on the charge to Volkswagen. It held that, since there was no proof of an intent to discriminate, the assessment had been reasonably "levied in its present form because it was necessary in the business judgment of respondent to do so." (R. 677.)

Petitioner sought review of the Commission's order in the Court of Appeals for the District of Columbia Circuit,[4] which affirmed. 371 F. 2d 747. The court held that the Commission's determination and application of Section 15 presented essentially a question of fact and that its determination was supported by substantial evidence within the criteria of *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. It found it unnecessary to pass on the application of Section 16 because it held that, under Section 17, the assessment of automobiles on a measurement-ton basis was reasonable in the light of past practices in the collecting of the Association's general dues.

The California suit remains stayed pending completion of judicial review of the Commission's order. The assessment on Volkswagen automobiles continues.[5]

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[4] Clearly, the Commission's order dismissing petitioner's complaint was a "final order," and hence reviewable only by instituting a judicial review proceeding in the court of appeals. 5 U.S.C. 1032; see *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. No one suggests otherwise.

[5] The fund was originally to be completely collected by 1966. That date has been extended, however, to permit enlargement of the fund, and the assessment continues in effect.

SUMMARY OF ARGUMENT

An employers' association of maritime companies agreed to create a "mechanization fund" for the benefit of longshore employees displaced by automation. The members of the association then agreed among themselves to collect the necessary moneys through a special assessment on each revenue ton of cargo handled. The assessment on foreign automobiles (principally Volkswagens) was so high—more than 20 percent of existing stevedore charges—that the stevedore contractors and marine terminal companies were unable to absorb it themselves and were forced to pass it on to Volkswagen.

I

Petitioner contends that the agreement among the association members imposing the mechanization fund assessment was ineffective because not filed with the Federal Maritime Commission. We agree. Section 15 of the Shipping Act requires all agreements among persons subject to the Act providing for a "cooperative working arrangement" to be filed and approved before being implemented. The allocation agreement was clearly of this character. This conclusion is compelled not merely by the language but also by the purpose of Section 15: to afford the Commission an opportunity to determine, in advance, whether maritime agreements that could unduly restrain competition or injure shippers should be forbidden as contrary to the public interest or permitted with antitrust immunity. The agreement at issue here is vigorously attacked as discriminating against a ship-

per, and may raise serious questions under the conspiracy provisions of the Sherman Act. The scheme of the Shipping Act requires that such an agreement be scrutinized at the outset by the Maritime Commission under Section 15, not left to later or piecemeal challenge under other provisions.

The ruling we urge would import no interference with the collective bargaining process in the maritime industry. The allocation of the cost of the mechanization fund among the members of the employers' association is a purely internal matter of the employers. It involves no issue of labor relations; it is a matter of indifference to the union.

II

Apart from Section 15, the allocation agreement as it affects petitioner raises serious issues under other provisions of the Shipping Act to which the Commission, in our view, gave inadequate consideration. Section 16 forbids subjecting particular shippers to any unreasonable prejudice or disadvantage. Section 17 forbids unreasonable practices relating to the handling of cargo by maritime companies. On the face of it, there is merit in the claim that both provisions are offended by the automobile assessment. It burdens one class of cargo—automobiles—far more heavily than any other—and automobile shippers probably benefit least directly from the contemplated steps to further mechanization of the docks. The only justification suggested is that any assessment method would necessarily weigh more heavily on some shippers. This, we regard as inadequate, especially since in assessing automobiles the association departed from

the formula it employed for other cargo. Accordingly, we urge that the Commission be directed to give further attention to petitioner's charges of discrimination.

ARGUMENT

I

THE MECHANIZATION FUND ASSESSMENT AGREEMENT COULD NOT LAWFULLY BE IMPLEMENTED UNTIL FILED WITH, AND APPROVED BY, THE FEDERAL MARITIME COMMISSION PURSUANT TO SECTION 15 OF THE SHIPPING ACT

The Pacific Maritime Association—a trade association for collective bargaining composed of the ocean carriers and marine terminal operators serving West Coast ports—agreed with the union representing the stevedores and longshoremen at those ports to raise for their benefit a fund to cushion the impact of a program to eliminate feather bedding and increase mechanization of stevedoring and longshoring operations. The members of the Association then agreed among themselves upon a special assessment levied on each ton of cargo handled as the method of raising the "mechanization fund." The first question presented is whether the implementation of this latter agreement—fixing the assessment—is unlawful (as petitioner contends) because it was not filed pursuant to Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814.

That provision requires that there be filed with the Federal Maritime Commission "every agreement" among those subject to the Act

> fixing or regulating transportation rates or fares; giving or receiving special rates, accom-

> modations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *

Until and unless it is submitted to, and approved by, the Commission, "it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement"; heavy civil penalties are imposed for infractions of this prohibition. Section 15 goes on to direct the Commission to cancel any filed agreement—

> that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of [the Act]. * * *

And, finally, it is provided that Commission approval immunizes an agreement from challenge under the antitrust laws.

We stress that the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission. We think so.

A. THE PLAIN LANGUAGE AND EVIDENT PURPOSES OF SECTION 15 COMPEL THIS CONCLUSION

1. An agreement among maritime companies allocating a shared cost incurred under an industry-wide collective bargaining contract is within the literal terms of the filing requirement of Section 15. The assessment formula—none contests—was an "agreement"; the parties were subject to the Act;[6] and, in establishing a common plan to discharge their joint obligation to the employees under the collective bargaining agreement, the Association members entered into a "cooperative working arrangement." This much the Commission itself recognized. Nor would it strain the statute to also view the agreement—were it necessary—as "giving * * * special privileges or advantages" (which it clearly does for at least one class of cargo, see *infra*, pp. 36–42); as "regulating * * * competition" (since agreements allocating joint costs have traditionally been viewed in that light, see *infra*, p. 24); and as "providing for a * * * preferential * * * arrangement" (in view of the allegation that the burdens of the agreement fall unequally on the members of the shipping public).

[6] The common carriers by water which belong to the Pacific Maritime Association are conceded to be subject to the Act. The Commission assumed as much with regard to the maritime terminal companies. The examiner specifically so found (R. 641–642) and this finding was correct. The Act embraces (besides carriers) "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" (46 U.S.C. 801), and it is not denied that the marine terminal companies which belong to the Association provide such facilities in connection with common carriers by water. See *California* v. *United States*, 320 U.S. 577.

The burden of persuasion on the question of the applicability of Section 15 would seem to lie with those who would carve out an exception to the broad statutory language, which so clearly covers the type of agreement involved here. Yet, we do not rest our affirmative case with the words of the enactment. The legislative history, design and manifest purposes of the Shipping Act argue strongly for giving Section 15 its literal force in this instance.

2. For a very long time the Nation has seen a serious danger in the untrammeled concert of action among businessmen—in cartels, price-fixing agreements, group boycotts, and other forms. This distrust is rooted in concern with the monopolistic abuses that such agreements foster, and, beyond that, in hostility to allowing private firms to exercise quasi-governmental powers of economic regulation. As early as 1890, the Sherman Act broadly prohibited combinations, contracts, and conspiracies to restrain trade or to monopolize.[7] To be sure, that legislation proved ineffectual in the shipping industry, partly because the special conditions of that industry seemed to warrant some cooperative restrictions upon free competition. Yet, serious and frequent abuses soon called for regulation.

[7] Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1, provides: "Every contract, combination in the form of trust of otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *." Section 2 provides: "Every person who shall * * * combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

It was against a background of increasing concern over the prevalence of government by private agreement and understanding in the ocean freight industry that the Shipping Act was enacted in 1916. See *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–490; *id.* at 511–513 (dissenting opinion of Mr. Justice Frankfurter). This concern extended far beyond the direct fixing of rates by agreement among the carriers. The report of the Alexander Committee [8] explored in detail the extent to which the decisions that importantly affected the shipper of goods or the traveler were made, not by the individual carrier or the terminal warehouseman with whom he dealt, but, rather, by monopolistic conferences and combinations. While concluding that some exemption from the antitrust laws was necessary to accommodate the unique needs of the shipping industry, the Committee expressed strong objection to the unsupervised exercise of quasi-governmental power by steamship conferences and other such combinations. The Committee stated (H. Doc. No. 805, 63d Cong., 2d Sess., p. 418):

> All monopolies are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through

[8] House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. The recommendations in this report provided the basis for the Shipping Act. *Isbrandtsen*, *supra*, 356 U.S. at 490.

> private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

While a number of the provisions of the Act relate to abuses of monopoly power by individual carriers or other persons subject to the Act,[9] Section 15 is central to the statutory scheme of bringing concerted action by members of the maritime industry under more effective control. In terms, it embraces anti-competitive agreements—those fixing rates, allocating markets, regulating the supply of services, discriminating among customers or excluding competitors; indeed, all agreements "controlling, regulating, preventing, or destroying competition"; and, for good

[9] Section 14, 46 U.S.C. 812, prohibits carriers from paying or allowing deferred rebates to any shipper; using "fighting ships" for the purpose of driving competing carriers out of the trade; retaliating against shippers who patronize other carriers; or unfairly or unjustly discriminating against shippers. Section 16, 46 U.S.C. 815, forbids any person subject to the Act to give any undue or unreasonable preference or advantage, or to engage in certain other unfair practices. Section 17, 46 U.S.C. 816, besides requiring all persons subject to the Act to establish, observe and enforce just and reasonable regulations relating to the handling or delivery of cargo, forbids unjust discrimination by common carriers by water.

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measure, all other cooperative working arrangements as well. The overriding concern with agreements which affect competition is emphasized in the provision directing the Commission to disapprove agreements embraced by Section 15 not only if they injure the commerce of the United States or the public interest but also if they contravene any of the specific prohibitions of the Act—most of them concerned with competitive abuses (see n. 9, *supra*, p. 21)—and in the further stipulation immunizing an agreement approved by the Commission from attack under the antitrust laws.

The background and structure of Section 15 reveal, we suggest, four interlocking purposes: (1) to force into the open, and assure Commission scrutiny of, all agreements that confer monopoly power or facilitate its exercise or abuse; (2) to provide a regulatory counterpart to Section 1, and the conspiracy provision of Section 2, of the Sherman Act; (3) to protect the industry's interest in reasonable restraints of competition by empowering the Commission, in appropriate circumstances, to immunize agreements that would otherwise violate the strict prohibitions of the Sherman Act; (4) to avert costly misplaced reliance on agreements that might prove to violate the antitrust laws or a specific prohibition of the Shipping Act, by requiring advance approval by the Commission of all such agreements.

Each of these goals would be thwarted by deeming the mechanization fund assessment agreement exempt from Section 15.

(1) The central concern of the Shipping Act in general and of Section 15 specifically was, as we have noted, to prevent members of the maritime industry from abusing the monopoly power that they enjoyed by virtue of being joined together in conferences or other combinations. The agreement challenged here binds together carriers and terminal operators who, thus leagued, completely dominate the shipping industry of the West Coast. Petitioner charges—and the charge is far from frivolous, as we show *infra,* pp. 34–42—that the agreement unfairly favors other shippers at its expense. Unless the agreement is declared unlawful, petitioner will have to yield to the marine terminal companies' demand that it shoulder the burden of the assessment on Volkswagen vehicles unloaded by them.

The present case thus squarely poses the question whether an allegation that a shipper has been victimized by a monopolistic combination of maritime firms must be appraised by the Commission before such a combination is implemented. We think it plain that Congress, in enacting Section 15, intended that it should be. Were it otherwise, the public would lack dependable protection against the harmful consequences of such agreements. Unless forced into the open by the filing requirement of Section 15 (and by the heavy sanctions that non-compliance with that requirement visits on the parties), the terms of the agreement might go undetected and unchallenged. And even if known, the agreement might elude effective remedial action under the remaining provisions of the Shipping Act and other applicable laws. Section

15 gives the public the broadest and most flexible protection by empowering the Commission to disapprove any agreement that it finds detrimental to the commerce of the United States or contrary to the public interest; no more specific adverse effect need be established.

(2) If Section 15 is to fulfill its framers' desire to create an effective regulatory substitute for the conspiracy provisions of the Sherman Act, any agreement, other than for merger,[10] which presents a Sherman Act question should be submitted to the Commission's scrutiny in advance of implementation. The Commission may, of course, approve it; if it does so, an antitrust suit will not lie. But, under the scheme of the Shipping Act, the Commission should also have the opportunity to disapprove it. It is plain that an agreement among competitors allocating a shared cost—the agreement here—is normally subject to the Sherman Act, since it may have a direct impact—as petitioner contends is the case here—on the prices paid by particular customers of the parties to the agreement. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–224; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235; *Anderson* v. *Shipowners Ass'n*, 272 U.S. 359; *National Macaroni Mfrs. Ass'n* v. *Federal Trade Com-*

[10] Unlike the Interstate Commerce Commission and the Civil Aeronautics Board, the Maritime Commission has no express authority to approve mergers. Compare 49 U.S.C. 5(2), 1384. Such an omission has been deemed significant in other contexts. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220; cf. *California* v. *Federal Power Commission*, 369 U.S. 482, 485.

mission, 345 F. 2d 421 (C.A. 7). That the shared costs originated in a collective bargaining agreement would not create an antitrust exemption. *Mine Workers* v. *Pennington*, 381 U.S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676.

(3) To exempt the agreement here from Section 15 would, of course, place it beyond the power of the Commission to immunize from challenge under the antitrust laws, and might result in outlawing such agreements in all circumstances. *United States* v. *Socony-Vacuum Oil Co., supra.* The scheme of the Shipping Act is to empower the Commission, not merely to condemn, but also to condone, agreements that in other industries would be illegal *per se* because they interfered with free competition. *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485. That scheme would be undermined if agreements like that at bar were beyond the scope of Section 15, for only agreements within its scope have antitrust immunity.

(4) Effective and orderly regulation of the shipping industry would be disrupted in still another way by a ruling exempting agreements among industry members allocating a common expense: it would invite costly, misplaced reliance and engender uncertainty, retarding sound business planning. An agreement not filed and approved under Section 15 may expose the parties to treble-damage liability, as well as an injunction, under the Sherman Act. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213. What is more, the agreement may be undone—after costly steps to implement it have been taken by the parties—in a proceeding to declare it unlawful under one of the

other provisions of the Shipping Act. Petitioner alleges that the instant agreement violates Section 16 and 17, and this Court's grant of certiorari is indication enough that the allegation is not frivolous. One can readily conceive of similar agreements that would raise even clearer questions under other provisions of the statute—for example, an agreement that imposed different charges on competing brands of automobile, or one that fixed different charges depending on the port at which the cargo was delivered. The orderly procedure is to determine the legality of such agreements under the Shipping Act and their entitlement to antitrust immunity before, not after, the parties implement and rely on them.

B. THE LINE DRAWN BY THE COMMISSION TO LIMIT THE REACH OF SECTION 15 IS UNSOUND

The Commission ruled that a cooperative agreement among persons subject to the Shipping Act is embraced by Section 15 only if it expressly imposes a burden on a shipper. Since the mechanization fund assessment agreement purported to exact contributions to the fund only from the parties to the agreement—all carriers or terminal companies—and did not expressly require that the burden of the assessment be passed on to any shipper whose cargo was assessed rather than absorbed by the Association members, it was, in the Commission's view, beyond the reach of Section 15.

We do not think that this ruling can stand in the face of the considerations canvassed in the preceding discussion. But the Commission's analysis is also

faulty on its own terms. The Commission's premise—that the Shipping Act is designed exclusively to protect shippers—is plainly false. Section 14 proscribes several practices designed to injure competing carriers, such as the use of fighting ships (see n. 9, *supra,* p. 21) and Section 15 itself requires the disapproval of agreements "unfair as between carriers." In any event, the premise does not support the Commission's conclusion. A shipper may be harmed by an agreement among the firms with whom he does business although the agreement does not purport to affect his business relations with them. We need look no further than the mechanization fund assessment agreement for a perfect example.

It blinks reality to suggest that it did not have a direct and substantial impact on shippers. Nominally, to be sure, no shipper was liable for the exaction. But maritime terminal companies—as they made clear to the Association—could not absorb in its entirety a special assessment equal to 22 percent of their normal charge and more than twice their profit. As all concerned well knew, the terminal companies had to pass it back to the shipper in the form of a higher charge. An agreement to do so would have been superfluous; to require it as a condition of applying Section 15 would be a meaningless exaltation of form over substance and would simply put a premium on ingenious draftsmanship.[11] True enough, there can be no Section

[11] The effect on the shipper is most direct, of course, when the amount of the assessment exceeds the stevedoring company's profit (as is the case with Volkswagens), but it will exist as well in cases in which the stevedoring company could

15 liability without an "agreement"—but the only agreement required by that provision is one providing a cooperative working arrangement among persons subject to the Act; it need not expressly involve shippers.[12]

The Commission deemed its rule necessary lest it be burdened with reviewing a multitude of wholly routine or trivial agreements. But the mechanization fund assessment agreement is not of that character,

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absorb the assessment and still be left with some profit. The company may not be satisfied with a reduced profit. And even if the immediate contractual or market conditions compel the stevedoring company to absorb some or all of the assessment, there has been added to the cost of handling the particular cargo an item of cost which is bound to be reflected in the stevedoring company's rates as soon as those conditions will permit.

[12] Herein lay the error of the court of appeals. It assumed with the Commission that an agreement to impose the assessment on petitioner was necessary to bring the assessment arrangement within the filing requirement of Section 15. Then, invoking *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, it deferred to the Commission's finding that there was no such agreement. As explained in the text above, such an ancillary agreement is wholly superfluous.

Although the point is not essential, we note that the finding that there was no agreement to pass on the assessment to Volkswagen is highly questionable. Initially, when petitioner made known its unwillingness to pay an additional charge covering the mechanization fund assessment, the Association planned to sue it directly. The device eventually adopted was a friendly suit between the Association and the terminal companies with the latter impleading petitioner. Either way, the inescapable inference would seem to be that the members of the Association regarded the obligation as ultimately that of the shipper, not the carrier or terminal company. This would be consistent with the traditional practice of the Association's members with respect to Association dues, which is to pass them on to the shippers in the form of higher rates.

and there can be no reasonable justification for an undiscriminating rule that excludes our agreement from the scope of Section 15 by assimilating it to such *de minimis* cases. In our view, Section 15 cannot be deemed—on the grounds of administrative convenience—to exclude an agreement that has a direct and substantial impact on shippers, as here.

This may mean that there will be some borderline cases where the obligation to file is not certain. The parties can protect themselves by filing any agreement arguably subject to Section 15.[13] Or the Commission could announce specific guidelines excusing certain defined categories of innocuous agreements from the filing requirement. There is clear precedent for such an approach. The Commission, at an early point in its enforcement of Section 15, held that a steamship conference was not obligated to submit for approval each rate change which it introduced in accordance with the terms of the general conference agreement on file with and approved by the Commission. *Section 15 Inquiry,* 1 U.S.S.B. 121. There has gradually evolved a fairly clear line between what is a change in a conference agreement and what is merely the routine application of an approved agreement. Compare *Empire States Highway Transp. Ass'n* v. *United States,* 291 F. 2d 336 (C.A.D.C.), with *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 56 (C.A.D.C.), certiorari denied, *sub nom. Japan-Atlantic & Gulf Conference et al.* v. *United States,* 347 U.S. 990. This process of administrative clarification could be continued and extended.

[13] Of course, this would not confer antitrust immunity were it later to be determined that the agreement was not subject to Section 15; but it would eliminate any danger of being penalized for failure to file.

C. THE ASSESSMENT AGREEMENT IS NOT EXEMPT FROM SECTION 15 BECAUSE IT IMPLEMENTS A COLLECTIVE BARGAINING AGREEMENT

A conclusion that the agreement imposing the special assessment for the mechanization fund is subject to Section 15 creates no conflict with any aspect of the national labor policy. Respondents appear to contend that, because the creation and collection of the fund was an obligation assumed in their collective bargaining agreement with the longshoremen's union, the issue of how the fund is collected from the members of the Association is an intrinsic part of the process of collective bargaining and therefore outside the scope of concern of the Maritime Commission. We agree that the Commission has not been empowered to supervise labor relations in the shipping industry. But respondents' analysis fails to make an adequate accommodation of the regulatory and labor policies which are involved.

We assume that the national labor policy permits employers to form multi-employer bargaining units, to bargain jointly with the union representing their employees and to pay the wages agreed upon in such multi-employer negotiations (see *National Labor Relations Board* v. *Brown*, 380 U.S. 278), and, accordingly, that the various stevedoring and terminal warehouse companies were free to join together in the Pacific Maritime Association and to agree among themselves on the terms and conditions of employment which they would negotiate with the union. It does not necessarily follow that the Commission must be entirely precluded from exercising any supervision of

the manner in which the activity is carried on. The Civil Aeronautics Board—proceeding under a statute (49 U.S. 1382) substantially identical to Section 15—has concluded that an agreement among air carriers to form a multi-employer bargaining unit is subject to the Board's prior approval. *Airlines Negotiating Conference Agreements,* 8 C.A.B. 354. Thus, it could be argued that while the Commission in a Section 15 proceeding could not deny permission to form a multi-employer bargaining unit, it could impose certain conditions relevant to its regulatory responsibilities—such as requiring reports of meetings or protecting the right of participating carriers to withdraw from the unit.

We do not go so far here. For purposes of deciding this case, we may assume that agreements which relate solely to collective bargaining or labor relations are excepted from the scope of Section 15 of the Shipping Act. Cf. *Kennedy* v. *Long Island R.R. Co.,* 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830. The basic agreement to provide a mechanization fund in a certain amount for the benefit of the longshoremen would appear to be of this character. And after the Association agreed to create the fund it had an ancillary obligation to collect it somehow. But at issue here is only the side agreement among the Association's members prescribing a special assessment on the cargo handled by them. Such an agreement among employers apportioning the cost of the labor contract is not a part of that contract, involves no question of labor relations, and is not subject to the jurisdiction of

the Labor Board. Indeed, the Association insisted, and the union accepted, that how the money was raised was no concern of the union. The union was satisfied with the Association's assurance that the money would be raised, and no one suggests that the Association cannot fulfill its obligation to the union by methods which do not violate the Shipping Act. Yet, while the challenged agreement involves no labor question, we have seen that it has a direct impact upon interests that the Shipping Act was designed to protect, and creates a danger of some of the specific discriminatory practices prohibited by the Act. Moreover, if the policy of the labor laws requires the exclusion of the mechanization fund assessment agreement from Section 15, it would follow with equal logic that the agreement was exempt from Sections 16 and 17 and all of the other substantive provisions of the Act—a result no one suggests.

It is argued that collective bargaining negotiations in the shipping industry might be disrupted by the delays consequent upon obtaining the Commission's approval of a method of funding a particular benefit before any step to implement the method was taken. But this unwarrantedly assumes that the Commission could not, or would not, act expeditiously in granting or withholding its approval of the method agreed upon. We assume, moreover, that ordinarily any challenge to such an agreement will concern only a particular and severable feature of it—here, the assessment on automobiles—and that the Commission is free to approve promptly, and permit immediate implementation of, so much of the agreement as is

not in dispute. This should minimize any disruptive effect on labor negotiations occasioned by the filing requirement.

There is a further point. Where, as in the present case, questions of legality apart from failure to file are raised, the agreement is under a cloud from the beginning anyway, whether or not it must be filed. An agreement such as that challenged here could, as noted *supra*, pp. 23–24, violate the antitrust laws or other provisions of the Shipping Act. Carriers and others might, therefore, decline to cooperate in carrying out such an agreement, fearing treble-damage liability and other sanctions. In these circumstances the processes of collective bargaining may be more helped than hindered by the availability of a procedure for removing legal uncertainty at the outset: filing the agreement with the Commission.[14]

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[14] A holding that the agreement should have been filed would not, we believe, entail disruption of the mechanization fund, notwithstanding that an agreement may not be lawfully implemented before approval by the Commission, if it must be filed. We assume that the members of the Pacific Martime Association, having paid the assessment voluntarily, would not seek restitution. If they did, the Commission could exercise its discretion to deny them any such relief. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621–622; *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (C.A.D.C.).

II

THE COMMISSION FAILED TO GIVE ADEQUATE CONSIDERATION TO THE COMPLAINT THAT THE DISPROPORTIONATE ASSESSMENT ON AUTOMOBILES WAS UNREASONABLE AND UNLAWFUL UNDER SECTIONS 16 AND 17 OF THE SHIPPING ACT

Petitioner argues not only that the mechanization fund assessment agreement is unenforceable because it was not filed with the Commission, as Section 15 of the Shipping Act in its view requires, but also, and independently, that the disproportionate assessment which the agreement imposes on automobiles violates Sections 16 and 17. The latter issue is ripe for consideration now even if the Court concludes that the agreement was required to be filed with the Commission and—not having been filed—is ineffective, since such a ruling would doubtless lead to its being filed and thus force the Commission to decide whether it should be approved. An agreement that violates a specific provision of the Act must be disapproved. We are not prepared to say, at this stage, that the Commission cannot hold that the agreement does not violate Sections 16 or 17, but we are persuaded that the Commission's analysis was fatally inadequate and that further consideration by it is necessary before it can properly approve the agreement in its entirety.

A. At the outset, we stress that there is no tenable basis for arguing that petitioner can challenge the Pacific Maritime Association's mechanization fund assessment on automobiles *only* under Section 15. Section 16, 46 U.S.C. 815, forbids "any common carrier by water, or other person subject to this Act, either

alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." On its face, this provision certainly seems broad enough to permit a shipper to complain that, as a result of an agreement among carriers and marine terminal companies, he is unfairly being made to pay more to unload his cargo than other shippers.

The Commission nevertheless held that Section 16 is violated only if there is a discrimination between competitors—not the situation here because the marine terminal companies have imposed no higher charge on Volkswagens than on other automobiles. The Commission's view is supported by the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21, 26–27, on which Section 16 of the Shipping Act is modeled. *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 480–481. However, in *New York Foreign Freight F. & B. Ass'n* v. *Federal Maritime Commission*, 337 F. 2d 289, certiorari denied, 380 U.S. 910, charges imposed on shippers in a random and unreasonable manner were held to be discriminatory under Section 16 although no competitive relationship among shippers charged the different rates had been shown. We believe this to be the better rule in view of the broad remedial purposes of the provision.

At all events, petitioner's challenge is plainly cognizable under Section 17, 46 U.S.C. 816, which re-

quires every common carrier by water in foreign commerce, "and every other person subject to this chapter," to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property." It is unquestioned that the exaction of an additional charge from petitioner to unload its vehicles at West Coast ports is subject to the Commission's scrutiny under this provision. See, generally, *California* v. *United States,* 320 U.S. 577; *Baltimore & O. R. Co.* v. *United States,* 208 F. 2d 734 (C.A. 3). Nor can there be any doubt that the additional charge levied by Marine Terminals Corporation of which petitioner complains was imposed pursuant to the mechanization fund assessment agreement.

B. That brings us to the question whether the disparate treatment accorded automobiles has reasonable justification. The Pacific Maritime Association decided that it would raise the mechanization fund required by its collective bargaining agreement with the union by assessing each member 27½ cents for each revenue ton of general cargo handled and 5½ cents for each revenue ton of bulk cargo. This method is not here in dispute. What is contested is the Association's further decision to adopt as the revenue ton for automobiles, not a weight ton, equal to 2,000 pounds, but a measurement ton, equal to 40 cubic feet. The average Volkswagen vehicle weighs only 1,800 pounds, but it measures 8.7 "tons" on a volume basis. So, instead of each Volkswagen's being assessed less than 27½ cents, it was assessed $2.35.

1. On its face, this exaction was grossly disproportionate and excessive. Previously, Marine Terminals Corporation (which unloads Volkswagens at the West Coast ports) had charged petitioner $10.45 per vehicle for unloading, of which about $1 represented the terminal company's profit. It obviously could not absorb the $2.35 mechanization fund assessment itself and was compelled to increase its charge to petitioner by that amount. This was the only class of cargo for which such an adjustment was necessary, simply because it was the only one where the special assessment so drastically increased the cost of unloading; the average increase for Volkswagens—22 percent—was 10 times the average increase for packaged general cargo.

The impact on automobiles was not only disproportionate but seemingly arbitrary. Other cargo was assessed as manifested in 1959. In the case of automobiles alone did the Association abandon that procedure and adopt a uniform measurement-ton assessment regardless of the 1959 practice. No other property, we stress, was handled this way. While the Association readily yielded to the pleas of the lumber industry for special concessions beyond those granted other bulk cargo, it turned a deaf ear to the complaints of the marine terminal companies that the automobile assessment was arbitrary and unfair and contrary to accepted trade practices.

Nor can the special treatment of petitioner [15] be justified on the ground that it will receive special

[15] All automobiles were assessed the same, but as the Association well knew, 90 percent of all the automobiles handled by Marine Terminals in San Francisco and Los Angeles are Volkswagens (R. 669).

benefits from the mechanization fund. Quite the contrary—it will receive only remote and indirect benefits from the fund. Largely as the result of improvements on its own chartered vessels, the unloading of its vehicles is already at optimum efficiency. Beyond the general advantage accruing to all shippers from a stable labor situation, the mechanization agreement contributed little to petitioner and nothing remotely proportional to its share of the costs of the fund.

Nor is it a satisfactory answer to petitioner's complaint to note that volumetric measurement is a commonplace method of assessing freight charges and one that has often been applied to automobiles. The fact of overriding economic significance about the carriage of freight on a ship is that the ship has a limited capacity. The earnings of the ship owner are immediately related to the amount of freight that can be fitted into the hold and the charges that can be exacted for that quantity of freight. If all freight charges were computed on the basis of weight, a shipload of an extremely bulky commodity would yield inadequate revenue. Thus the practice has evolved of giving the carrier the option of computing freight rates for commodities of more than a standard bulk (30 cubic feet per ton) on a volumetric basis. See Bross, *Ocean Shipping* (1956), pp. 189–190; Cutley, *Ocean Freights and Chartering* (1962), pp. 400–407.

However, there is a very serious question whether it is rational to use measurement tons as the basis for

allocating one of the costs of unloading freight at the dock. Except insofar as the stevedoring operation is combined with a terminal warehousing operation (*i.e.*, the storage of goods on shore), the fact that an 1,800 pound Volkswagen occupies ten times as much space as 1,800 pounds of some other commodity seems of doubtful relevance as a ground for imposing ten times as heavy an unloading cost.

The sum of it is that none of the accepted justifications for exacting a disproportionate charge from a user of a transportation facility—the value of the service to the user, the costs of the carrier, etc.—appears to be present here.

2. The considerations suggesting the unreasonableness of the automobile assessment were virtually ignored by the Commission. It refused even to consider whether the exaction conformed to the standards of Section 16, believing that provision wholly inapplicable because no competing cargo was charged less (p. 35, *supra*). We have already indicated why we consider this view unduly narrow; it seems especially inappropriate on the facts of this case. Unreasonably high transportation charges may fall upon a shipper with severe competitive impact even though other shippers similarly situated are subject to the same charge. Volkswagen competes in the United States domestic market against American manufacturers who ship by inland transportation. Price is obviously a crucial factor in this competition. If subjected to unreasonably high transportation charges, petitioner may suffer a significant injury to its com-

petitive position. We cannot accept that the Commission is free to disregard such possibilities.

The Commission did purport to test the reasonableness of the assessment under the standards of Section 17. It found that the assessment was not unreasonable, because substantial benefits had accrued from the mechanization fund agreement and there was no intent shown deliberately to burden automobile cargo. The Commission thought this enough, observing that there is no statutory requirement of a precise equivalence between services and charges for all users of a facility. The court of appeals reasoned that "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits" and concluded that in light of the historical use of tonnage formula, and the need for some practical way to divide the cost of the mechanization fund, the assessment was a reasonable " 'rough-and-ready' allocation measure" (R. 801, 799.)

Such analysis, however, is unresponsive to petitioner's complaint. Certainly, we grant that a relatively small charge, imposed uniformly on all for the benefit of all, can be justified as reasonable even though a particular shipper receives a lesser benefit than others. *Evans Cooperage, Inc.* v. *Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415. The Association's general dues may fall in this category. And doubtless considerations of ease and convenience of administration could justify assessing such a charge on a more or less arbitrary basis. Here, however, the charge is very substantial in relation to the

existing cost of the services involved; and it was not imposed uniformly. Rather, automobiles were treated differently from other classes of cargo—the 1959 manifests were not followed.

In these circumstances, it is no answer that the assessment of employers on the basis of revenue tons handled is, in general, roughly fair—for no one questions that. It is its particular application to automobiles that is challenged. We emphasize that the Association devised a special formula applicable only to automobiles. That formula cannot rationally be defended by reference to the different formula applied to other cargo. Nor can it be justified on the ground that the mechanization fund is intended to benefit shippers. Petitioner apparently benefits least, yet it is the only shipper compelled to contribute to the fund; on all other cargo, the assessment is absorbed by either the carrier or the terminal company. Finally, the absence of an intent to burden automobile cargo more than other types of cargo is not critical; it has long been established that discrimination in transportation charges and practices is to be tested by its impact, not by intent, favoritism or malice. *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 523–524; *Interstate Commerce Commission* v. *Chicago Great Western Ry.,* 209 U.S. 108, 122–123. In this connection, we note petitioner's charge that the Pacific Maritime Association is dominated by common carriers who have an economic interest in increasing the cost to Volkswagen of discharging the 75 percent of its automobiles which it imports as a private charterer and that the more Volkswagen can be compelled to pay as

a private charterer the less the common carriers will have to contribute to the mechanization fund.

A strong case of unreasonableness is thus made out on this record. We think it unlikely that the disparity in treatment can be justified on any acceptable ground, such as the unavailability of any alternative formula that would better accommodate the various competing interests. But that is a question for the Commission to consider in the first instance, free of the misconceptions which cloud the opinion under review.

CONCLUSION

The judgment below should be reversed with directions to set aside the Commission's order.

Respectfully submitted.

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AUGUST 1967.

APPENDIX

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are as follows:

Section 15:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory

or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modification, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or

after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modifications, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1–11 and 15 of Title 15; and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were enter into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment

of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Section 16:

* * * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * * *

Section 17:

* * * * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 779-801) is reported at 371 F. 2d 747, that of the Federal Maritime Commission (R. 666-728) at 9 F.M.C. 77.

Jurisdiction

The judgment of the Court of Appeals (R. 802) was entered on December 22, 1966. The petition for a writ of certiorari was filed March 20, 1967 and granted June 12, 1967 (R. 803). The jurisdiction of this Court is invoked under 28 U.S. C., sections 1254(1) and 2350(a) (Supp. II).

Statutes Involved

The pertinent provisions of the Shipping Act of 1916, as amended, 46 U.S.C., sections 801 *et seq.*, and of 5 U.S.C., sections 701 *et seq.*, relating to judicial review of agency action, are set forth in the Appendix, *infra*, pp. 1a-7a.*

Questions Presented

1. Whether section 15 of the Shipping Act requires filing with the Federal Maritime Commission of an agreement by which about one hundred twenty regulated enterprises, dominated by the large shipping lines, are exacting from cargo passing through Pacific coast ports five million dollars annually by means of unequal assessments imposing a disproportionate burden upon petitioner's automobiles transported predominantly by chartered vessels.

2. Whether charging automobiles for certain benefits relating to stevedoring and terminal handling ten times as much, and raising their discharge costs ten times as much, as those of other cargo receiving equal or greater benefits, violates section 16, which prohibits common carriers and other regulated persons from subjecting anyone to "undue or unreasonable prejudice or disadvantage" or section 17 of the Act which demands the enforcement of "just and reasonable regulations and practices."

3. Whether, in any event, the decision below should be reversed because the court, to sustain the agency's

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* For the convenience of the Court there is also set forth in the appendix certain statutory material discussed in the brief: the anti-pooling and related provisions of the Interstate Commerce Act (49 U.S.C., sections 1 *et seq.*), as they read at the time the Shipping Act was enacted, and in 1962, when *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), was decided, as well as section 412 of the Federal Aviation Act (49 U.S.C., section 1382).

action, resolved for itself factual and legal issues which the Commission, deeming them outside the case, had never reached or considered.

Statement of the Case

At issue in this proceeding is the applicability of various provisions of the Shipping Act of 1916, as amended, ("Act") to a private levy imposed by agreement among the maritime enterprises serving the Pacific coast upon the privilege of discharging or loading cargo. This impost falls most heavily upon petitioner's cargo.

The Mechanization and Modernization Fund

The levy giving rise to this case is the creation of intervenor Pacific Maritime Association ("PMA"), to which about one hundred and twenty companies belong (R. 179, Exs. 46-48, R. 538-587). This is an association composed of the principal common carriers by water, stevedoring contractors and terminal operators serving the West coast ports (Ex. 3, R. 382-384, 616, 667). It was organized for the purpose of negotiating and administering collective bargaining agreements (R. 179).

Among the members of PMA are Marine Terminals Corporation and Maritime Terminals Corporation (of Los Angeles) ("MTC"), respondents in the Commission proceeding (R. 614-615, 667). Marine Terminals Corporation is also before this Court as an intervenor.* These companies are in the business of furnishing stevedoring and terminal services at San Francisco and Long Beach, California (R. 614-615). Ninety percent of their business is done for common carriers (R. 615).

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* Leave to intervene in the Court of Appeals was not sought by Marine Terminals Corporation (of Los Angeles).

Petitioner, Volkswagenwerk Aktiengesellschaft ("VW"), the manufacturer of Volkswagen automobiles, is not a member of PMA, nor is it eligible to be. It is, however, the largest dry cargo shipper on contract carriers to the West coast (R. 614, 165, 150-151), importing by far the greatest number of automobiles passing through Pacific coast ports (R. 136, 150). VW's cars arriving at San Francisco and Long Beach, California, by chartered vessel, and also some coming by common carrier, are discharged by MTC (R. 138-139). At other ports, similar services are rendered by other PMA members in connection with Volkswagen vehicles (*cf.* R. 169-170 with Exs. 46-48, R. 538-587). About 40,000 Volkswagen vehicles enter annually through the Pacific coast ports (R. 612).

This proceeding has its genesis in a financial liability assumed by PMA in 1960-1961 as the price for more efficient operations on the waterfront (R. 668-669, 618-620, Ex. 1A, R. 243-261, Ex. 1B, R. 262-278, Ex. 1C, R. 279-309). After several years of negotiations the International Longshoremen's and Warehousemen's Union ("Union" or "ILWU"), the collective bargaining representative of the Pacific coast longshoremen and marine clerks, agreed to permit the "utilization of labor-saving devices" and the elimination of "restrictive work practices" in cargo handling in return for the creation of a "Mechanization and Modernization Fund" of twenty-nine million dollars (Ex. 1C, pp. 2-3, R. 280, 618-620, 668-669). This fund ("Mech Fund" or "Fund") is to be used to cushion the effects of higher productivity upon the Union's members (617-619, 668-669).

These arrangements between PMA and the Union supply the background for this case, but are not in issue here. Petitioner has repeatedly expressed the view that they represent a most praiseworthy achievement.

It is the inequitable way in which PMA is collecting the money for the Fund that gives rise to the present

controversy. Upon the insistence of PMA, the Union has no voice in how this is done. The decision as to how this sum shall be raised is entirely PMA's (R. 619-620, 668, Ex. 1C, pp. 7-8, R. 283-285, 205-211).

In October 1960, when the Union and PMA reached agreement on the size of the Fund, subject to ratification by their respective memberships, PMA already had in hand one and a half million dollars of the total required (R. 668, 618-619, 193-198). As evidence of its good faith, it had collected this sum while negotiations were proceeding. PMA undertook to accumulate the balance, twenty-seven and a half million dollars, at the rate of five million dollars a year for five and a half years (R. 618-619, 668, Ex. 1B, p. 6, R. 270, Ex. 1C, p. 7, R. 283-284).

The Cooperative Working Arrangement for Raising $5,000,000 Annually

A committee appointed by PMA to advise it regarding how the five million dollars a year was to be raised recommended what it described as "admittedly * * * a rough-and-ready way to divide the cost": payment to PMA of a fixed dollar-and-cents amount on every ton of cargo "manifested for loading or discharging at Pacific Coast ports" (Ex. 5A, pp. 4-5, R. 470-471, 623, 668-669). The committee explained that it was recommending "the present tonnage formula used for the computation of a portion of the PMA dues" (*ibid.*).* It proposed that the rate on bulk cargo be only one-fifth that on general cargo (*ibid.*).

The committee decided against allocating the cost of the Fund by the method which it recognized would be "pre-

* PMA's by-laws provide for three types of membership dues denominated cargo dues, shipping dues and payroll dues (Ex. 3, R. 404-405). Cargo dues were based, at the time, on a combination of the tonnage loaded or discharged at Pacific coast ports and man hours of work, in roughly a 40-60 ratio (Ex. 5B, R. 478). What the majority of the committee recommended was use of the tonnage formula without any man hour factor; a minority wanted to copy exactly the dues ratio and base the Fund sixty percent on man hours and only forty percent on tonnage (*id.* at R. 475).

cise in placing the burden of the Fund on those benefiting from it" (Ex. 5A, p. 2, R. 467). Such a formula would have required "a contribution system based on specific measurement of improvements in longshore productivity of each operator over a base year" (Ex. 5A, pp. 1-2, R. 467). The committee also considered and rejected using man hours as a measure (Ex. 5A, pp. 2-4, R. 468-469). Fear of a Union take-over of the system of assessment played a large part in the committee's deliberations and was an important factor in the decision not to use the alternatives considered (Ex. 5A, pp. 2, 7, R. 467, 472).

The committee recognized that inequities might arise from its "rough-and-ready" measure and recommended annual review "to prevent the continuation of any such inequities that may develop" (Ex. 5A, p. 9, R. 474). PMA's Board of Directors, on January 6, 1961, disapproved the favored treatment the committee recommended for bulk cargo and proposed assessing all tonnage equally (Ex. 2P, p. 2, R. 379-380, 623). However, on January 10, 1961, PMA's membership voted to put the formula recommended by the committee into effect without this change (Ex. 2O, R. 372-377, Ex. 6, R. 479-480, 623-624, 669). At the same time the membership ratified the collective bargaining agreement calling for the creation of the Mech Fund (Ex. 2O, p. 4, R. 377).

PMA's Board of Directors met on January 16, 1961 to translate the formula for raising the Fund approved by the membership into a specific dollar-and-cents amount (Ex. 2N, R. 369-372). Apparently this was done by dividing the amount needed for 1961, five million dollars, by the tonnage which was estimated would be discharged and loaded during the year, making appropriate allowance for the fact that bulk cargo would pay only one-fifth as much as general cargo. The rates computed in this fashion came to 27½ cents per ton for general cargo and 5½ cents for bulk cargo (Ex. 2N, R. 369-372, Ex. 35, R. 521-523, 624).

Disproportionate Burden Imposed on Automobiles

Total wages paid by PMA members for stevedoring and terminal labor in 1962 were slightly in excess of one hundred million dollars. The five million dollar levy for the Fund represented, therefore, about five percent of direct labor costs (R. 169). The Fund assessment raised the average cost of discharge for general cargo about 2.2 percent (Ex. 7, R. 482).

The effect upon direct labor costs and overall discharge costs for petitioner's vehicles would be roughly in line with other general cargo if the PMA assessment were computed upon weight tonnage (Ex. 7, R. 482, 168-169). However, if measurement tons are used, the PMA tax * jumps from $.25 per car to about $2.35 (R. 626). This is because on the average a Volkswagen vehicle has a measurement tonnage approximately ten times its weight tonnage (R.166-167, 626).** A levy of $2.35 per car raises the pre-existing discharge costs about 25 percent, as compared to 2.2 percent for

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* The Court of Appeals described the use of the word "tax" as "forensic rather than analytical" (R. 798). However, it is not petitioner, but PMA which first dubbed the assessment a "tonnage tax" (R. 209-210). This is how PMA's President repeatedly referred to it in his testimony (*ibid.*).

** Two different types of vehicles are shipped by petitioner to the United States Pacific coast. The "egg-shaped" Volkswagen passenger models, which consists of the sedan, the sunroof sedan, the convertible and the Karmann-Ghia, has an average weight of 1,643 pounds per unit or about 8/10 of a weight ton. These cars, however, have a measurement of 7.8 cubic tons. The "box-shaped" Volkswagen models, referred to generally as the "transporter line," which includes the station wagon ("Microbus") and trucks, have an average weight of 2,193 pounds equivalent to about 1.1 weight tons. They measure on the average 456 cubic feet, corresponding to 11.4 measurement tons (R. 166). Based upon the approximate ratio between passenger cars and transporters shipped to the United States Pacific coast, an average Volkswagen vehicle can be said to have a weight of about 0.9 tons and a measurement of 8.7 tons (R. 167).

other general cargo, and increases labor costs for this fringe benefit about 56 percent in contrast with the five percent experienced by all other cargo (R. 135, 149, 168-169, 175-176, 670).

In short, the selection of measurement tons as the basis for the tax results in burdening Volkswagen automobiles about ten times as much as general cargo.* The disproportion is even greater as to bulk cargo which pays one-fifth the rate of general cargo, and greatest as to the commodities subsequently favored by PMA, like logs and lumber.

Initially, uncertainty prevailed regarding whether automobiles would pay on weight or measurement (Ex. 32, R. 519-520). The PMA tax was predicated upon how cargo is manifested, and in the manifesting of automobiles neither weight nor measurement is uniformly employed (R. 669-670, 629, 165-166, 176-177). On chartered ships, automobiles are manifested on a unit basis, but weight and sometimes measurement are shown (R. 165-166, 629, 669-670). On common carriers, both appear (R. 175, 629-670). Tariffs, on the other hand, are on a unit basis and this is the way petitioner pays for its stevedoring and terminal services (Ex. 7, R. 483-484, 139).

Payments to PMA for membership due in connection with shipments of Volkswagen vehicles reflected the diver-

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* Neither MTC nor PMA offered any evidence to question VW's proof that PMA's tax fell ten times as heavily on Volkswagen automobiles as on any other cargo. Although the ten to one ratio formed the heart of petitioner's case and was established by uncontroverted evidence, the Examiner and the Commission failed to make a specifically requested finding on this point (R. 605). Exception was taken to this omission (R. 659-660). Only in the Court of Appeals was this central fact recognized, even if somewhat grudgingly, when the court conceded that "the record made by petitioner is strong—though not as strong as petitioner puts it" (R. 800).

sity in manifesting practices and were paid on all three bases: by unit, by weight and by measurement tons (Ex. 26, R. 511, 84-85). For one company automobiles were reported as "one (1) unit and/or one (1) ton" (Ex. 12, R. 494). MTC predicated their dues payments on measurement tonnage (R. 621-622, 670, 677).

As all the stevedoring contractors discharging Volkswagen vehicles recognized, assessments on a measurement tonnage basis would encounter strong resistance from petitioner (R. 152-153, 240-242). Like bulk cargo and scrap metal, automobiles became the subject of intensive discussion within PMA (R. 241). But whereas remedial action was taken in the case of both bulk cargo and scrap metal (p. 11, *supra*), automobiles were made the subject of a peculiarly harsh rule.

To make certain that automobiles made maximum contributions to the Fund regardless of manifesting practices, PMA's Vice President on February 3, 1961 sent the membership a letter requiring both membership dues * and Mech Fund assessments to be paid on measurement tons (Ex. 36, R. 524-525, 625-626). The letter cited as authority an earlier 1958 communication (never produced by PMA) purportedly taking the same position regarding membership dues. The February 3, 1961 letter was sent because investigation by PMA's Vice President into "Volkswagen shipload shipments" (R. 84) disclosed that PMA's membership dues were being reported on a weight basis (R. 84-87).

Later that month a new committee appointed by PMA to review questions arising in connection with the collection

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* Corrected reports regarding PMA's membership dues were demanded but when petitioner sought at the hearing to determine what PMA's records showed as to whether they had ever been submitted, the inquiry was blocked on the ground that to search the files would be too burdensome (R. 86).

of the Fund (R. 90-91) met to take up, among other things, petitioner's protest against the unfair way in which its costs were being raised (R. 628-629, Ex. 10, R. 487-488). The Committee not only refused all relief but confirmed that in the case of automobiles, uniquely, the manifest was not to be decisive (R. 109-112, 629, 669, 677). Automobiles were to be taxed on a measurement ton basis, regardless how manifested (R. 628-629, 69). Automobiles were thus made the subject of a special rule, since as to all other cargo the manifesting practice of the carriers remained decisive (R. 670, 102-103). Moreover, among the alternatives available, weight, measurement or units, the special rule prescribed the most burdensome solution.

The Unsuccessful Protests by VW and Others

VW promptly protested the "overwhelming discrimination [against automobiles] which is implicit in an attempted levy at a level 10 to 15 times greater than assessed on other general cargo" (Ex. 7, p. 3, R. 481-485). A letter was sent PMA on January 17, 1961 pointing out that Volkswagen vehicles were often freighted, and therefore manifested, for the purposes of liner shipments on a unit basis; that measurement was irrelevant for stevedoring and terminal handling as evidenced by the identical rate paid for the 7.8 cubic ton sedan and the 11.4 cubic ton "Micro-bus"; that automobiles were freighted and manifested in the intercoastal trade on weight basis only; that wharfage on automobiles was according to weight rather than measurement; and that no substantial savings could be expected in the handling of automobiles (*id.*, pp. 2-3, R. 483-484).

Petitioner was not alone in its objection to the use of measurement tons for vehicles. The Army also questioned this ruling (Ex. 10, R. 489, Ex. 22, R. 509, 628 n.18, 633). A carrier, the Hanseatic Vaasa Line, MTC's largest

account after petitioner, carrying automobiles for discharge on the Pacific coast, likewise complained to MTC (R. 238-239).

MTC corroborated the injustice being done petitioner's cargo. In November 1961, at a meeting held by PMA with VW and its stevedore contractors, MTC stated that the "present assessed rate on automobiles is not based on practical conditions and has no comparison to other commodity assessments" (Ex. 25, R. 510). VW again pointed out all the reasons making unfair use of measurement tonnage for the Mech Fund assessment (Ex. 26, R. 511-514).

None of petitioner's many protests, however, resulted in any change in PMA's decision that automobiles were to pay ten times as much proportionately as other general cargo (Ex. 31, R. 517-518, Ex. 32, R. 519-521, 629-630, 670).

Adjustments Made by PMA

Although PMA justified its treatment of petitioner as based on fear of an "assessment rate structure similar to a tariff" (Ex. 10, R. 488), it had no hesitation in tailoring and adjusting its "rough-and-ready" tax in the self-interest of its membership.

Overruling its Board of Directors, PMA's membership, in adopting the assessment plan, put the rate on bulk cargo at one-fifth that of general cargo (R. 623). The Board had wanted all cargo to pay the same rate (*ibid.*). The reduced rate was thought to be justified by the comparatively small amount of labor involved in the discharge of bulk cargo and the correspondingly limited opportunity for future labor savings (R. 77, 114-115). For similar reasons, PMA's Board of Directors immediately thereafter made the one-fifth bulk cargo rate applicable to scrap metal which so far had been considered as general cargo and so reported for dues purposes (R. 78, Ex. 2N, R. 370-371, Ex. 35, R. 522).

Subsequently, but on quite different grounds, radical changes were made in the tax on coastwise shipments which must compete with land transportation. As a first step, the rate for such shipments was cut in half (Ex. 10, R. 487-492, Ex. 22, pp. 16-17, R. 366-367). This was done because coastwise carriage is "a very marginal business economically" (Ex. 10, p. 2, R. 490). Next, logs and lumber moving in this trade were singled out for even more favorable treatment. By two resolutions of the Board of Directors, assessments on these commodities were further reduced retroactively to 2½ cents per ton (Ex. 2F, pp. 4-5, R. 354-355, Ex. 2D, p. 4, R. 348-349, 631). An internal PMA memorandum explains that the original assessments "would [have] put the coastwise lumber industry out of business" (Ex. 21, p. 1, R. 503).

Consideration was also given some of the Army's objections. Departure from the tonnage shown by the manifest was authorized for empty Army conexes (Ex. 10, R. 488-489, Ex. 2L, R. 366). The Army was also permitted to determine the tax on containerized cargo through use of average, rather than actual, measurement (Ex. 2I, R. 361-362).

An industry-wide change was made in the assessment in December 1961 as a result of concern that nothing was being paid into the Fund for tonnage handled within a terminal but not in or out of a ship (R. 97-98, 630-631). A fifteen cent charge was placed on each man hour worked by ship's clerks (*ibid.*). This reduced the tonnage charge to 24¼ cents for general cargo and to five cents on bulk cargo (Ex. 56, R. 594-595, Ex. 57, R. 777-778).

Thus, PMA's levy is a complex one with different rates for general cargo, coastwise cargo, bulk cargo, lumber and logs, and with special rules for scrap metal, automobiles, Army conexes and containers. It is still continuing under a new collective bargaining agreement adopted in 1966 and providing for enlargement of the Fund.

PMA's Shipping Lines Control Its Actions

PMA acts in the self-interest of the persons who control it* and these are the shipping lines. PMA's by-laws give its carrier membership a majority on its Board of Directors (Ex. 3, pp. 5-9, R. 382-386, 74-75) and the controlling vote at membership meetings (Ex. 3, pp. 11-12, R. 387-388; compare Exs. 39-41, R. 525-538 with Exs. 46-48, R. 538-587.)** In addition, carriers furnished all the members of both the PMA committee appointed to consider how the cost of the Mech Fund should be allocated and the commmittee subsequently formed to pass upon any inequities resulting from that method (Compare R. 75-76, 90-91 with Exs. 46 and 47, R. 540-553, 555-570). Despite the fact that this involved a cost relating exclusively to labor employed in stevedoring and terminal operations, neither committee included a single representative of the terminal operators or stevedoring contractors unaffiliated with a steamship line.

True, under PMA's plan its carrier members ultimately foot the bill for the Fund assessment on cargo shipped by them to or from this country (Ex. 55, p. 2, R. 589-591, Ex. 2L, R. 367-368). If tax considerations had not intervened, they would have paid it directly (R. 77, Ex. 35, R. 521-523). PMA requests its carrier members to "advance to their contractors sufficient monies with the remittance advice in or-

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* This was insisted upon by PMA's own counsel before the Commission:

> "PMA members, like members of similar organizations, are not altruistic. It is probable that each member of PMA will exercise its voting power in its self-interest and will seek to persuade other members to its views whether or not they have the same interest." (Brief of PMA to Examiner, p. 11.)

** The Examiner's finding "that there is no substantial evidence in the record to support Volkswagen's contention" that liner interests dominate PMA (R. 649 n.42) is irreconcilable with PMA's own by-laws, which are in evidence, and forms the subject of a specific exception by VW (R. 662-663) on which the Commission made no ruling.

der that the contractors may make payments promptly to the Association" (Ex. 55, p. 2, R. 590). If, for any reason, the stevedore or terminal operator defaults in payment, the member steamship company is liable (Ex. 1C, pp. 15-16, R. 289).

On the other hand, the carrier members of PMA do not carry the burden of the Mech Fund assessments as to cargo loaded or discharged for non-PMA members, *i.e.*, non-PMA carriers and chartered cargo (Ex. 55, p. 2, R. 589-591, Ex. 21, R. 503-504). Over seventy percent of petitioner's cargo is transported by chartered vessel (R. 614) and much of the remainder by non-PMA carriers (Compare R. 164 with Exs. 39-41, R. 525-538, 632). Consequently, the more Volkswagen automobiles pay towards the five million dollars needed annually, the less has to come out of the pockets of PMA's carrier members. As the Chairman of PMA's two funding committees conceded on the witness stand: "Any reduction of anyone's assessment will increase everybody else's for the reason that this is a lump sum that has to be raised" (R. 133).

Thus, when scrap metal was brought under the low bulk cargo rate (*supra*, p. 11), the rate for all other general cargo was increased three-quarters of a cent per ton. In considering whether the change should be made, concern was expressed that other commodities might seek similar consideration and specific reference was made to automobiles (Ex. 2N, p. 2, R. 370).

In February 1962, an internal PMA memorandum (Ex. 28, R. 515), prepared when "the reduction of assessments on automobiles to a lesser amount" was being considered (Ex. 29, R. 516), deals entirely with the impact an adjustment in the assessments on this cargo would have on the over-all rate. This memorandum concludes that cutting the automobile assessment in half (which would have meant that automobiles paid five, rather than ten, times as much proportionately as other general cargo) would have caused an

increase of 2.6 percent for all other cargo (*ibid.*). Not surprisingly, therefore, those in control of PMA disapproved any reduction in the assessment on petitioner's cargo (Ex. 31, R. 517-518).

Efforts by PMA to Collect the Assessments on Volkswagen Automobiles

Prior to adoption of the Mech Fund assessment by PMA, MTC's profit on the discharge and terminal handling of each Volkswagen vehicle was one dollar or less (R. 145). As a matter of practical economics, therefore, the PMA tax which amounted to about $2.35 per vehicle had to be passed on to petitioner. Had the tax been placed on a weight basis, in which event it would have amounted to about twenty-five cents per car, MTC would have been willing to continue working at the old commodity rate, as it advised VW (R. 154). But when measurement tons were made the base, all the contractors discharging Volkswagen vehicles recognized that it would have to be collected from petitioner (R. 626-627).

When MTC called on VW for the money, however, VW refused to pay because it considered the assessment on a measurement basis to be "unjust" (Ex. 9, R. 486-487). MTC was told that the assessment, if included in the rate, would be deducted (Ex. 9, R. 486, 627). MTC promptly advised PMA of these developments and asked for advice on "what stand we can take in demanding payment of this assessment" (Ex. 9, R. 486-487, 634). VW's representatives were told that "we at Marine Terminals Corporation are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter" (*ibid.*).

Subsequently, PMA's Board of Directors took up "the problem of collecting funds from Volkswagen due the Mech-

anization Fund" (Ex. 2H, p. 4, R. 356-357). MTC requested PMA's Board of Directors for authority "to bring suit against Volkswagen for the monies due" and for "both legal and moral support" in connection therewith (*ibid.*). These requests were granted (R. 634). But further consideration led to tactical changes (Ex. 2F, p. 6, R. 355). When litigation finally started on August 14, 1962, it took the form of a suit by PMA against MTC and the other onshore operators engaged in discharging Volkswagen automobiles for the unpaid assessments (R. 18-27). MTC impleaded VW (R. 28-39), which secured a stay of these judicial proceedings pending determination by the Commission whether the Shipping Act had been violated (R. 671-672).

The Proceedings Below

In January 1963, VW filed a complaint with the Commission, naming MTC as respondents and challenging the legality under the Shipping Act of the underlying agreements among the members of PMA and the acts taken by them in execution of these agreements (R. 12-17). PMA made itself a party to this proceeding by intervening (R. 43-57, 1).

The Examiner and a majority of the Commission found no violation of the Act. Section 15, requiring all cooperative working arrangements to be filed and approved before execution, was inapplicable, the majority ruled, because it applied "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 673-674). The PMA agreement, the Commission ruled, did not meet this test because of the absence of "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675). Accordingly, as the Examiner had held, the "non-filing of a copy" of its cooperative working arrangement did not violate the Act (R. 656).

Section 16 was held to be unavailable because petitioner had not shown that cargo competitive with its automobiles had been preferred (R. 676). Regarding section 17, the Commission found nothing unreasonable in MTC's "passing on" of the Mech Fund assessments (R. 676-678). Although it acknowledged that automobiles were burdened more heavily than other cargo for no greater benefits, the Commission declared that as long as "substantial benefits" were received it would not declare a charge unlawful. "There is no statutory requirement," the Commission said, "that all users of a facility be assessed equally" (R. 677).

Commissioner Hearn disagreed with the conclusion reached by the Commission as to section 15; he thought PMA's plan came under the majority's reading of that section (R. 722-728). Commissioner Patterson strongly dissented on all points, finding all the sections invoked by petitioner to have been violated (R. 678-722).

In deference to the Commission's "expertise," the Court of Appeals, "albeit with some hesitation," accepted the agency's conclusion that PMA's funding arrangement was not covered by section 15 (R. 792-794). Examining under section 17 not only MTC's passing-on of the assessments but also PMA's actions, as the Commission had failed to do, the court concluded that PMA had acted reasonably in taxing automobiles on a measurement rather than a weight basis (R. 794-801). If section 17 was not violated, section 16 was likewise satisfied (R. 801). Hence the court found it unnecessary to pass on the Commission's reasons for deeming that section unavailable.

In affirming dismissal of petitioner's complaint, the court made it plain that it was not closing its eyes to, but that it considered outside the issues of the case, "petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter" (R. 801n.13).

Summary of Argument

Direct labor costs and total discharge costs for automobiles have been raised from ten to one hundred times as much as for other cargo, for the same benefits, through PMA's tonnage tax. Sections 15, 16 and 17 of the Shipping Act were all enacted to curb discriminatory treatment of shippers. Yet, under the decisions below, none of these provisions reaches this obvious discrimination.

I

Section 15 requires filing and approval before execution of any agreement between covered persons involving discrimination, *i.e.*, "giving special privileges or advantages" or "preferential" arrangements, or involving rate-fixing or control of competition, as well as "cooperative working arrangements." PMA's assessments fall squarely into these categories. Lumber, bulk cargo and scrap metal are being favored and automobiles disadvantaged. PMA's assessments control competition and regulate charges for terminal services. The arbitrary allocation of a common cost is a price-fixing device. As the Examiner found, and as no one denies, there is present here a "cooperative working arrangement" among persons subject to the Act. But the Commission puts PMA's program outside section 15 on the ground that legislative history shows the statute applies "only to those agreements involving practices which affect that competition" which otherwise "would exist between the parties when dealing with the shipping or travelling public." To the contrary, the legislative history confirms that Congress intended what the words of the statute say, that all concerted action in the maritime industry, whether or not the parties are competitors or the persons affected are shippers, passengers or carriers, must pass governmental scrutiny. The Commission's view, if accepted, would divide jurisdiction over collective action in the maritime industry between the absolute prohibitions

of the antitrust law and the license, under governmental regulation, of the Shipping Act. Such a division would wreck the legislative scheme, invite administrative chaos and shelter anticompetitive conduct.

The Court of Appeals mistakenly held that its review of the Commission's construction of section 15 was governed by the "substantial evidence" rule. Actually, however, a court reviewing administrative action has both the power and the duty to resolve such questions of a purely legal nature, involving neither fact-finding nor administrative expertise and which judges are best equipped to handle.

II

The Commission recognized that a section 15 agreement meeting the conditions it laid down would be present if PMA's stevedoring and terminal operator members had explicitly agreed to pass-on PMA's assessments to petitioner and their other non-PMA customers. But section 15 embraces more than common-law contracts; it extends as well to "understandings * * * and other arrangements." All concerned participated in and relied on the understanding that "passing-on" of the assessments was an integral part of the scheme. In fact, in the case of Volkswagen automobiles, passing-on was mandated by the size of the PMA tax. Both decisions below applied a wrong legal standard focusing on what the parties said rather than what they did.

III

Resort to section 16 was held to be foreclosed by the Commission because no cargo competitive with automobiles had been preferred. But, as the Commission has recognized both before and since, this "competitive cargo" requirement is inapplicable where arbitrarily different charges are made for similar benefits. This latter and sounder view is supported by judicial decisions construing section 16 and the parallel provision of the Interstate

Commerce Act and should have been applied here. Because of its view on the section 17 issue, the Court of Appeals did not pass on this question.

IV

A.

The Commission applied the wrong rule to the wrong issue. First, it held section 17 to be satisfied if "substantial benefits" were received by Volkswagen automobiles, regardless how disproportionate the return exacted for such benefits. Such an interpretation licenses exactly the discrimination the statute was intended to prevent. Second, the Commission examined in accordance with this erroneous rule only the reasonableness of MTC's attempted pass-on of PMA's assessments, not the assessments themselves or the considerations lying behind the discriminatory treatment of petitioner's cargo, all of which clearly had been challenged by petitioner.

B.

The Court of Appeals agreed that it was the PMA tax itself, not simply the pass-on, which had been attacked. The court adjudicated this issue itself in place of remanding for determination by the Commission. Invading the administrative area, the court sustained PMA's discriminatory treatment of automobiles as justified by history and administrative convenience. Both legally and factually it erred.

C.

Prohibited discrimination under section 17 is to be tested by objective standards. To make one cargo subsidize another breaches section 17. Because petitioner's automobiles are being compelled to pay far more than their proportionate share of a common industry cost, while favored cargo contributes less, section 17 is violated by the PMA tax.

ARGUMENT

I

The interpretation placed on section 15 by the Commission and erroneously deferred to by the court below guts the Shipping Act.

The common carriers, contracting stevedores and terminal operators comprising the membership of PMA are engaged in a cooperative working arrangement under which a disproportionate share of a common cost has been shifted to Volkswagen automobiles. The tax they are levying is as inescapable as any within the power of government.

The words of the Alexander Report * (p. 304) which prompted passage of the Shipping Act, fit like a glove.

> "[S]teamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory * * *. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective governmental control."

Section 15 of the Shipping Act forbids execution of such a cooperative working arrangement until approved by the Federal Maritime Commission. To put PMA's plan outside section 15, the Commission refuses to accord the statutory language its plain meaning and imposes instead a series of interlocking requirements rendering section 15 impotent to remedy the evils it was enacted to reach.

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* By the "Alexander Report" is meant the "Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade" of the House Committee on Merchant Marine and Fisheries, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

A

In enacting the Shipping Act it was the intention of Congress to subject all collective action in the maritime industry to governmental scrutiny.

The reasons for the passage of the Shipping Act are well known. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-490; *id.* at 504-513 (dissenting opinion of Mr. Justice Frankfurter) (1958); *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213, 218-219 (1966). Early in this century, at a time when Congress was concerned with anti-competitive combinations generally, the shipping industry was made the subject of a searching inquiry by the House Committee on Merchant Marine and Fisheries under the chairmanship of Congressman Alexander. This investigation turned up evidence of typical monopoly practices. Chief among the victims were carriers competitive with the shipping cartels and shippers who patronized them. Because "in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control" (Alexander Report, 304), many abuses were revealed. Exporters and importers filed complaints with the Committee, objecting, among other things, to excessive rates, discrimination among shippers in rates and cargo space and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination (*id.* at 308, 417). Shippers paid rates which were fixed "arbitrarily, both with reference to the general level and particular commodities" (*id.* at 305).

Because absolute freedom of competition was considered impracticable in ocean shipping, the remedy proposed was governmental regulation. Influencing the Committee was the fact that shippers, in general, concurred in the view that the conference system was mutually advantageous if "honestly and fairly carried out" (*id.* at 308, 418-419). However, the uniform experience had been that "once the

combination of lines is established, it is apt to be used in an arbitrary and unfair way" (*id.* at 308, 418-419). Accordingly, what shippers favored was a "comprehensive system of government supervision, sufficiently broad to embrace the regulation of rates without actually fixing them, the approval of contracts, agreements and arrangements, and the general supervision of all conditions of water transportation which vitally affect the interests of shippers" (*id.* at 308, 418). In the view of the Committee, the "discriminations and arbitrary treatment" accorded shippers by the steamship monopolies could "only be eliminated by the establishment of some legally constituted authority which is empowered to hear complaints and to order the discontinuance of abuses" (*id.* at 308, 419).

The Committee was "not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action" (*id.* at 417). The Shipping Act [39 Stat. 728 (1916)] followed. *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 490 (1958).

When the bill was under consideration, Representative Alexander opposed an amendment that would have removed portside services from its coverage. 53 Cong. Rec. 8277 (1916). He explained that for an agency to effectually regulate water carriers and prevent "unjust discrimination between shippers" "it must also have supervision of all those incidental facilities connected with the main carriers." 53 Cong. Rec. 8276 (1916).

The Shipping Act is admirably designed to accomplish the legislative purpose. Its first section defines broadly the persons subject to its provisions so as to embrace not only common carriers by water, but suppliers of ancillary services used by the carriers as weapons to penalize and punish shippers employing competitive transportation.

Other sections prohibit specific abuses which the hearings had revealed. *Inter alia,* section 14 bars any carrier by water from discriminating against any shipper because "such shipper has patronized any other carrier * * * or for any other reason." Section 16 forbids discriminatory acts and section 17, unjust and unreasonable practices.

These explicit regulatory sections are complemented by section 15, drawn to ensure that no collective action may be taken in the maritime industry without prior government scrutiny. This provision requires the filing and approval of every agreement (by which is meant as well "understandings, conferences and other arrangements") falling into any one of seven categories, among persons subject to the Act. Included is any agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; * * * or in any manner providing for an exclusive, preferential or cooperative working arrangement." An agreement failing to meet certain requirements is not to be approved. Approved agreements are exempt from the antitrust laws.

During the last decade Congress has repeatedly demonstrated its continued concern with the regulation of collective action in the maritime industry by strengthening the Shipping Act and reorganizing its administration. These steps have been taken in consequence of investigations disclosing that the "recommendations of the Alexander committee, culminating in the historic Shipping Act of 1916, have, through no fault of that committee, utterly failed in attaining its objectives." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 385 (1962); H.R. Rep. No. 498, 87th Cong., 1st Sess., 6-7 (1961); S. Rep. No. 1, 89th Cong., 1st Sess., 22-23 (1965).

During the 87th Congress exhaustive investigations made by the House Committees on the Judiciary and on

Merchant Marine and Fisheries resulted in several amendments of the Shipping Act in the interest of more effective enforcement. 75 Stat. 762 (1961). Significantly, no change was made in the broad coverage of section 15. To afford shippers greater protection than the investigation showed they had been receiving, however, the Commission was directed to disapprove any section 15 agreement if it found "failure or refusal [of the parties thereto] to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." 75 Stat. 764 (1961). Furthermore, the Commission was directed to disapprove any agreement found to be "contrary to the public interest." 75 Stat. 763 (1961).

But Congress looked mainly to the reorganization of the regulatory agency to make the Shipping Act function as intended. Both Committees laid the blame on "the successive regulatory bodies charged with administering and enforcing" the Act for the failure "to give to international shipping practices that supervision which was anticipated by the authors of the 1916 act." H.R. Rep. No. 498, 87th Cong., 1st Sess., 6 (1961). Of the Commission's predecessors the House Judiciary Committee said:

> "For a period of almost 45 years, lethargy and indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 359-360 (1962).

To improve the administration of the Act, the Federal Maritime Board was replaced with the present Federal Maritime Commission. Reorganization Plan No. 7, 75 Stat. 840 (1961); H. R. Rep. No. 1419, 87th Cong., 2d Sess., 3, 397 (1962); Note, *Rate Regulation in Ocean Shipping,* 78 Harv. L. Rev. 635, 642 (1965).

But in 1965, when ocean shipping practices once more came under Congressional scrutiny, the conclusion was

again reached that "actual regulation of steamship conferences has never been carried out. * * * Neither the protection of free competition in the market place nor the protection of Government regulation has been provided the public." S. Rep. No. 1, 89th Cong., 1st Sess., 22 (1965).* Once more the responsibility was laid at the door of the administrative agency. What was specifically criticized was how shipper's complaints had been discouraged by the "ineptitude and neglect of the Federal Maritime Commission" (*id.* at 27-28). "The expense and delay of a legal quarrel against both the steamship conference and an indifferent or hostile regulatory agency were simply too much for shippers to assume" (*id.* at 27). In consequence of these new disclosures, changes were made in the personnel of the Commission and in its staff, and new procedures were instituted (*id.* at 28).

Thus the Act's legislative history going back six decades shows a consistent Congressional purpose to bring collective action in the maritime industry under effective governmental control. Congress's most recent recommendation to the Commission is that it "use all of its statutory powers to protect American commerce from discrimination" and maintain "strict surveillance" over steamship operators "to protect the public interest" (*id.* at 5).

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* What the Joint Economic Committee, the author of the report, said was:

> "Broadly speaking, the succession of regulatory agencies that have been charged with administration of the statute, each in its brief turn, have been poorly informed and ill equipped. They have simply not known what was occurring in the industry, and have generally had no grasp of legal or technical principles. They proceeded on particular instances, and established no positive rules of conduct. In the absence of general standards based on national policy, the tendency became irresistible to permit what was on the one hand adroitly advocated by special interest, and on the other hand was not condemned under articulated guidelines."

B

The arrangement among the membership of PMA represents exactly the type of collective action Congress intended to subject to scrutiny in the public interest.

There is present here precisely the type of collective power which the statute was drawn to control, exercised by exactly the persons the statute was intended to cover, to the prejudice of just such a shipper as it was designed to protect.

That the common carriers who dominate PMA are under the Shipping Act is unquestionable. And MTC, like most, if not all, of the balance of PMA's membership, (R. 617), are as squarely covered by the definition of "other person" in section 1 of the Act. This term means anyone other than a common carrier by water "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." MTC are terminal operators engaged in furnishing terminal facilities to common carriers by water (R. 640-643). Their pier and storage facilities are exactly the type referred to in the Act. *California* v. *United States*, 320 U.S. 577 (1944). And in earlier proceedings, as well as in this one (R. 641), MTC have been found to be "other persons subject to this chapter." *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946): *Carloading at Southern California Ports* (*Agreement* No. 7576), 2 U.S.M.C. 784, 786 (1946). *Cf., Investigation of Certain Storage Practices*, 6 F.M.B. 301, 313-315 (1961).

It is doubtful whether any cartel investigated by the Alexander Committee exercised power greater than that enjoyed by PMA. Acting through the medium of that organization, the carriers dominating it can exact tribute from every ton of cargo entering or leaving our shores by way of the Pacific coast. As PMA's President conceded, its as-

sessments carry the potential for "abolishing whole segments of the industry" (R. 212). Just as automobiles are taxed one hundred times as much as coastwise lumber, so can they equally well be made the subject of a levy one thousand times greater.

Petitioner belongs to just the category of persons the Act was enacted to protect: shippers who employ transportation competitive with that provided by the organized carriers. Approximately three-fourths of petitioner's very substantial shipments to the Pacific coast arrive by chartered vessel (R. 614), making petitioner the largest dry-cargo shipper employing such carriage to these ports (*ibid.*).

Finally, the overall result exactly parallels the abuses leading to the Shipping Act. Organized shipping lines are acting together to discriminate against a shipper employing competitive transportation.

Not surprisingly, therefore, the language employed by Congress to bring collective action in the maritime industry under effective governmental supervision covers PMA's plan four-square.

C

PMA's agreements fix transportation rates, give special privileges, regulate competition and provide for a cooperative working arrangement.

No one denies that the plan is a "cooperative working arrangement" among persons subject to the Act. The Examiner so found (R. 639-640) and this finding is questioned neither by the Commission (R. 672-673, 674) nor by the court (R. 786). Since section 15 requires filing for approval any agreement "in any manner providing for an exclusive, preferential *or* cooperative working arrangement" (emphasis added) no further inquiry is necessary.

But PMA's impost is covered by more than this omnibus language. PMA's program also involves "fixing or regu-

lating transportation rates or fares," "giving or receiving * * * special privileges and advantages" and "controlling, regulating, preventing or destroying competition."

Rates for terminal and stevedoring services are fixed and regulated by the establishment of a uniform or artificial cost. No rate can go below the floor thereby created. That PMA's plan regulates rates was recognized by both dissenting commissioners (R. 698, 709-710, 727). As Commissioner Patterson pointed out:

> "The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to pre-existing rates for terminal facilities. Respondents [MTC] had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure." (R. 709).

PMA's program also provides for "special privileges and advantages." Bulk and scrap metal pay only one-fifth as much as general cargo. That the coastwide trade, and particularly lumber, is heavily favored is indisputable. Coastwise lumber carries only one-tenth the assessment imposed on general cargo (p. 26, *supra*). Moreover, to the extent that the discharge of automobiles is disproportionately burdened with a cost common to all cargo discharged at the Pacific coast ports, all other cargo is "receiving special rates * * * or other special privileges or advantages." "[A]ny preferred treatment by charges or otherwise of certain classes of cargo results in discrimination against other cargo." *Practices, Etc., of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588, 603-605 (1941), *aff'd, sub nom., California* v. *United States,* 46 F. Supp. 474 (N.D. Cal. 1942), *aff'd,* 320 U.S. 577 (1944).

Finally, PMA's tonnage tax also affects competition. PMA's on-shore members, by committing themselves to pay

PMA approximately $2.35 for every vehicle they handle, have curbed their ability to compete by lowering their prices. Recognition that the assessment inhibited competition is shown by the decision to subsidize the coastwide trade in general, and lumber in particular, by radically reducing the assessment on these commodities. As PMA's internal records disclose, this was done in order to permit water transportation to remain competitive with land carriage (p. 12, *supra*).

Indeed, wages always affect prices. Labor's special standing may immunize such effect from the antitrust laws, if it is a legitimate consequence of a collective bargaining agreement requiring labor to be paid in proportion to use. But wholly different considerations apply if employers, acting in concert by agreement, artificially allocate a common labor cost to specific commodities, discriminating against outsiders and subsidizing their own businesses. To quote Commissioner Patterson again:

> "If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control" (R. 710).

Creation of an unavoidable artificial cost element is a far more effective price-fixing device, *pro tanto*, than a mere exchange of promises regarding future pricing policies.

This is demonstrated by what occurred here. Before even the first dollar was paid, the terminal operators discharging Volkswagen vehicles took counsel with one another regarding the changes they would have to make in their rates. As the Examiner found:

> "It was the consensus of the group that the company doing the discharging would be unable to absorb the contribution if it was assessed on a measurement basis and it was indicated that the assessment should be passed on in the stevedoring rate to the customer" (R. 626-627).

Costs cannot be increased artifically and by agreement without impact upon customers. Taking jurisdiction of an agreement among common carriers regarding payments to foreign freight forwarders, the Commission itself has observed:

> "There can be no doubt that the agreement to pay commisions abroad had some resulting impact on the landed costs of goods in this country." *Investigation of Practices, Operations, Actions and Agreements, West Coast of Italy,* 1967 A.M.C. 467 (1966).

Similarly, if Pacific coast stevedores paid PMA assessments, they necessarily had to include them in negotiating their charges with their customers. As PMA itself has pointed out:

> "Obviously the costs of the Mechanization Plan, accepted by PMA in exchange for ILWU's acceptance of labor saving cargo-handling operations, were among the many costs included within the mix and ultimately reflected in the commodity rate." *Answer of Intervenor Pacific Maritime Association to Memorandum for the United States,* 7 (May 30, 1967).

To agree regarding some elements entering into the final price is to fix to that extent such price. To inhibit price freedom is anticompetitive. *Cf. United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221-224 (1940).

D

To exclude PMA's agreement from section 15 the Commission has rewritten and eviscerated the statute.

That PMA's assessment program is within the plain meaning of the text of section 15 is admitted by the Commission (R. 673-674). But the Commission does not deem itself obligated to apply the language as written. According to the Commission:

> "[T]he legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 674).

For the PMA plan to meet this test it would have to be demonstrated, the Commission says, "that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675). In other words, proof of an express contractual commitment to pass on the assessment would have to be forthcoming.

This elaborate definition cannot be squared with either the language of section 15 or the underlying regulatory scheme. On the contrary, each of its constituent parts flies into the teeth of both.

First, section 15 is not confined to agreements between persons in competition with one another. On the contrary, "every common carrier by water, or other person" is required to file a copy of "every agreement with another such carrier or other person." A freight forwarder does not vie for business with a carrier, yet "agreements or understandings * * * between forwarders and carriers may be discriminatory in such a way as to violate the provisions

of § 15." *United States* v. *American Union Transp., Inc.*, 327 U.S. 437, 447 (1946). Similarly, it could scarcely be maintained that a lessor of terminal facilities as such is in competition with his lessee, but such a lease may nonetheless be subject to section 15. *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959), *aff'd sub nom., Greater Baton Rouge Port Comm'n* v. *United States*, 287 F. 2d 86 (5th Cir. 1961), *cert. denied*, 368 U.S. 985 (1962).

Indeed, even the Commission's defenders are driven to declaring that the agency did not intend to limit "the scope of section 15 only to agreements between parties in direct competition with each other" (Brief for the Federal Maritime Commission in Opposition, 15n.7; Brief for Intervenors in Opposition, 14). But then, what becomes of the elaborate edifice which has as its cornerstone the requirement that the agreement must "affect that competition" which otherwise "would exist between the parties"?

There are difficulties with the Commission's formula even if all the Commission meant is that the agreement must be one affecting competition. Why then, in addition to agreements "controlling, regulating, preventing or destroying competition," did Congress carefully enumerate and define six other categories of covered agreements?

Finally, what leads the Commission to conclude that only shippers or travelers are protected by section 15? Under the Commission's exegesis, to come under section 15 an agreement must have an impact upon "the shipping or traveling public or their representatives" (R. 674). According to the Commission, agreements within section 15 are those relating to the "rates, fares, charges or commissions paid to or by shippers, passengers, forwarders, brokers, agents, etc." (*ibid.*). Conspicuously missing is any reference to charges paid to or by carriers.*

* Most inconsistently, however, the opinion later states the critical issue in this case to be the existence of an additional agreement by PMA's members to pass on the assessments "to the *carriers* and shippers served by the terminal operators" (R. 675) (emphasis added). This suggests that the effect upon carriers, as

But one of the reasons which led to the passage of the Shipping Act was concern for the independent carrier. See *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 488-493 (1958). This is reflected in the statutory direction to disapprove any agreement found "to be unjustly discriminatory or unfair as between carriers" as well as "shipper, exporters, importers, etc." Indubitably, sections 16 and 17, the specific prohibitory sections complementing section 15, protect carriers as well as shippers or travelers. *E.g., Philippine Merchants S.S. Co., Inc.* v. *Cargill, Inc.,* 9 F.M.C. 155 (1965); *Boston Shipping Ass'n, Inc.* v. *Port of Boston Marine Terminal Ass'n,* F.M.C. Docket No. 66-28, June 28, 1967. Why should section 15, which is central to the regulatory scheme, receive a more restrictive reading? In fact, jurisdiction exercised without question in the past under section 15 over agreements affecting carriers would seem to be in jeopardy. *E.g., Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965); *Northern Pan-American Line* v. *Moore-McCormack Lines,* 8 F.M.C. 213 (1964).

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well as shippers or travelers is relevant. But the preceding sentence in the opinion explains that what the Commission is looking for is "impact upon outsiders," and, of course, carriers are not "outsiders" to PMA's arrangement. Moreover, the discussion of the evidence which follows appears to be limited to whether this was an agreement to pass-on to petitioner, that is, to a shipper. Certainly, the dissenting opinions are so confined. Nevertheless, PMA says that the Commission found that its "funding arrangements were not designed to pass on to *carriers* and shippers the stevedore's costs of participation in the Plan" (emphasis altered). (Answer of Intervenor Pacific Maritime Association to Memorandum for the United States, 10). Petitioner believes on the contrary that one of the reasons the Commission excluded carriers from its test was because no such finding can possibly be made on this record. Admittedly, however, it is impossible to reconcile the inconsistencies within the Commission's opinion. The Commission's decision should be reversed for this reason, if for no other. A reviewing tribunal should not be "left to spell out, to argue, to choose between conflicting inferences." *United States* v. *Chicago M., St. P. & Pac. R.R.,* 294 U.S. 499, 510-511 (1935); *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 295 U.S. 193, 201-202 (1935).

Finally, assuming that section 15 could legitimately be restricted to agreements affecting competition for shipping or traveling business, certainly such effects should be sought as much, if not more, in the necessary, inevitable or even intended consequences of an agreement, as in its explicit terms. Why then should an explicit contractual commitment to pass on PMA's assessments be determinative?

As the Commission itself has pointed out, to determine if an agreement lessens competition:

> "[W]e must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements. * * * To decide otherwise is merely to reward the clever draftsman at the expense of our regulatory responsibility." *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California,* 8 F.M.C. 521, 529 (1965).

E

None of the authorities cited by the Commission support the elaborate, interrelated requirements it reads into section 15.

Neither the Commission nor its defenders make any attempt to reconcile the drastic surgery performed on section 15 with the legislative history of the Act, with the statutory language, with the regulatory scheme or with past interpretations. No consideration whatever is given to the policy of the Act nor how it will be affected by the administrative gloss now placed on its language. Our criticisms of that construction based on the outrage to the text and the frustration of the legislative intent are left unanswered.

The Commission justifies its narrow, crippling prescriptions on purely technical grounds. It presents them as com-

pelled by legislative history, not as needed or desirable to carry out the broad remedial purposes intended to be served by the Act.

But, in fact, the legislative materials relied on by the Commission in no way support, let alone require, the result reached. They do indeed show that the Shipping Act had its source in Congressional concern over anticompetitive arrangements. But what they make equally clear is that the remedy selected by Congress was to place under supervision all collective action in the maritime industry, not simply such conduct as could be demonstrated to be anticompetitive. In addition to the Alexander Report itself, the Commission rests its interpretation upon the opposition expressed in 1961 by the Assistant Attorney General then in charge of the Antitrust Division to any change in the broad sweep of section 15 (R. 674 n.2).

At the time Congress was considering amending section 15 to give the Commission's predecessor power to "exempt [an] agreement or category of agreements" upon finding that it "does not limit or restrict competition between the parties thereto or between such parties and others." S. Doc. No. 100, 87th Cong., 2d Sess., 27, 73 (1962). The Assistant Attorney General opposed the amendment on the ground "that all agreements described in section 15 can be presumed to limit or restrict competition or they would not have been included in the language of the section"* and the proposal was abandoned. *Id.* at 28.

Fully aware that not all the agreements swept up by the all-embracing language of section 15 would necessarily turn out upon examination to limit or restrict competition, Congress, nevertheless, left the language of section 15 unchanged. It adhered in 1961 to the all-inclusive language

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* *Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries,* 87th Cong., 1st Sess., 428 (1961).

it had adopted after exhaustive study in 1916. Thus, contrary to what the Commission concludes, the language which Congress "selected as a matter of deliberate choice" exactly reflects the legislative intent. *Carnation Co.* v. *Pacific Westbound Conf., supra,* 383 U.S. 213, 220 (1966).

The other straws relied on by the Commission give it as little support. That it may have excluded from section 15 agreements to pool secretarial workers or to share office space or otherwise refused in the past to apply section 15 literally does not justify either the elaborate requirements now read into section 15 nor the results reached.

Nor can such justification be found in *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd,* 319 F. 2d 366, 372 (2d Cir. 1963), *cert. denied,* 375 U.S. 830 (1963), the final authority cited by the Commission. In that case a labor union attacked a railroad strike insurance plan on the ground, among others, that it violated the Sherman Act and a similar but more limited prohibition of the Interstate Commerce Act, section 5(1) [49 U.S.C., section 5(1)]. That section embraces "any contract, agreement or combination * * * for the pooling or division of traffic, or of service, or of gross or net earnings or of any portion thereof." The District Court held that section 5(1) was intended to reach "a well-defined type of anti-competitive arrangement" and had "no application to payments made for strike insurance." 211 F. Supp. at 489.

Section 15 should be similarly limited, the Commission says, in deference to the principle that "settled construction in respect of the earlier act [the Interstate Commerce Act] must be applied to the later one [the Shipping Act]" (R. 674). But this principle, as the Commission itself recognizes, is subject to the very important qualification that there be nothing "peculiar in the questions under consideration" or "dissimilarity in the terms of the act relating thereto" requiring a different conclusion (R. 674-675).

When the Shipping Act was enacted, section 15 and section 5(1) were wholly dissimilar in language and purpose. Whereas section 15 was broadly drawn to bring under governmental supervision anti-competitive conduct otherwise permitted and deliberately excluded from the reach of the antitrust laws, section 5(1), as originally enacted [Interstate Commerce Act, 24 Stat. 379, 380 (1887)], anticipated the broader but similar provisions of the Sherman Act by flatly prohibiting a narrowly-defined type of anti-competitive conduct.* *Cf. United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897). What it proscribed was the "pooling of freights" or the division of earnings. In 1920, after passage of the Shipping Act, section 5(1) was amended to permit such pooling agreements if approved and authorized by the Interstate Commerce Commission. Section 407, Transportation Act of 1920, 41 Stat. 456, 480 (1920). But neither at that time, nor later when the Interstate Commerce Commission was given power to exempt certain additional types of agreements among railroads from the antitrust laws [62 Stat. 472 (1948), 49 U.S.C., section 5b],** did the Interstate Commerce Commission ever enjoy jurisdiction comparable to that given the Federal Maritime Commission over all agreements "controlling, regulating, preventing or destroying competition" and over "cooperative working arrangements."

Significantly, in *Kennedy,* the Second Circuit found it necessary to distinguish the different results reached under language similar to that contained in the Shipping Act, *i.e.,* that in section 412 of the Federal Aviation Act (49 U.S.C., section 1382). Like the Shipping Act on which it is pat-

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* For the convenience of the Court, section 5(1), as it appeared at the time of the enactment of the Shipping Act, is reproduced in the Appendix (p. 4a, *infra*).

** Pertinent provisions of the Interstate Commerce Act, as they read at the time of the decision in *Kennedy,* are reproduced in the Appendix (pp. 4a-6a, *infra*). It should be noted, however, that section 5b (49 U.S.C., section 5b) was not involved.

terned [*McManus* v. *Civil Aeronautics Board*, 286 F.2d 414, 419 (2d Cir. 1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290, 291 (1966)], the Federal Aviation Act immunizes anticompetitive arrangements from the antitrust laws provided they first are filed and approved. The Civil Aeronautics Board has assumed without question that agreements which affect labor-management relations are no different from other types of collective action and must be filed and approved like any other. *Airlines Negotiating Conference Agreements*, 8 C.A.B. 354 (1947); *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959). The Second Circuit noted that the result reached by the Board "was apparently dictated by statutory language considerably broader than that of the antipooling provision of section 5(1) of the Interstate Commerce Act." 319 F.2d at 374n.11.

Furthermore, nothing in *Kennedy* supports the elaborate interrelated requirements the Commission now reads into section 15. *Kennedy* would exclude only agreements, like the one there under consideration, which did not effect "an unnatural and anticompetitive regulation of the pricing, supply, or distribution of goods or services." 319 F.2d at 373. *Kennedy's* strike insurance plan* placed no restraint "upon commercial competition in the marketing and pricing of goods and services." 319 F.2d 372-373. But since PMA's agreement clearly places such a restraint, it would still be covered.

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* Each railroad subscribed to an insurance program under which it paid a premium equal to its daily fixed costs for benefits of the same amount in the event of a strike. 319 F.2d at 366. As benefits were paid out, the fund was supplemented by further deposits by the non-struck roads. Neither the payments made by the railroads for the insurance nor the moneys received affected their competitive position. Unlike the payments to the Fund here involved, those in *Kennedy* were not allocable to any specific class of business. They were general overhead expenses which could be allocated as the railroad pleased. As for strike benefits, they were received only when the railroad had been temporarily eliminated from the market, so clearly they could not affect its competitive position.

In sum, none of the conventional guides to statutory construction justify reading the plain language of section 15 as meaning anything different from what it says: that all agreements among covered persons providing for a cooperative working arrangement, or otherwise described in the statute, are to undergo governmental scrutiny.

F

The court below should not have deferred to an erroneous administrative construction predicated on conventional judicial grounds.

In accepting "albeit with some hesitation" the agency's construction of the law in "deference to the expertise of the Commission" (R. 792), the court below confused the responsibility of the executive and the judiciary. The Commission's opinion reflects the fact that it resolved the issues in this case in two steps; first, determining what it believed to be the controlling rule of law and second, applying it to the facts before it. Without distinguishing between the two, the court treated the result reached as insulated from critical examination under the "substantial evidence" rule, taking as its touchstone *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607 (1966).

But the standards appropriate for reviewing the fashioning of discretionary relief by a regulatory agency are not proper guides where the issue is one of statutory construction peculiarly within the judicial competence and which the agency decided by application of the standards employed by the courts rather than in reliance on considerations within its special province. *Cf. Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960). The Administrative Procedure Act preserves the power of the courts to reject agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights" and to "decide all relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C., section 706.

All that the Commission invoked were traditional tests of a purely legal nature. The courts are far better equipped by training and experience than the agency to give these matters their proper value. Only such weight should be given the Commission's construction as is appropriate having regard to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 499-500 (1958); *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 290-292 (1965); *Federal Trade Comm'n* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965); *Milk Transp. Inc.* v. *Interstate Commerce Comm'n,* 190 F. Supp. 350, 354-355 (D. Minn. 1960), *aff'd,* 368 U.S. 5 (1961).

So unpersuasive is the Commission's construction that it should have been rejected under any test. It is not a tenable interpretation since, in addition to all else, it demolishes the regulatory scheme and substitutes anarchy. Any projection will show these to be its results.

G

To leave the antitrust laws to cope with PMA's cooperative working arrangement destroys effective control of anticompetitive arrangements in the shipping industry.

"There are in theory two methods of overcoming the disadvantages of monopoly: competition and regulation. In this Nation economic theory and legislative policy have long coincided. Our laws forbid monopolies and in those special cases, like utilities, where elements of monopoly are unavoidable, they provide for public regulation."* Be-

* Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee of Congress, 89th Cong., 2d Sess., "Discriminatory Ocean Freight Rates and the Balance of Payments," 16 (Committee Print 1966).

cause absolute freedom of competition was thought impracticable in ocean shipping, governmental regulation was substituted for the protection normally provided by free competition. S. Rep. No. 1, 89th Cong., 1st Sess., 21 (1965).

The legislative scheme requires that the scope of the Shipping Act be, at least, coextensive with that of the antitrust laws. Indeed, one would expect that of the former to be even broader because of the differences between regulation and prohibition. And, in fact, as noted earlier (p. 24, *supra*), the language of section 15 is more sweeping than the Sherman Act or any other antitrust law.

But as the Shipping Act is now interpreted by the Commission, the situation is reversed. Left outside section 15 is conduct long condemned by the antitrust laws. This emerges clearly in the opinion of the court below. Taking cognizance of petitioner's claim that what is here involved is a "combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter," the court suggests that petitioner's remedy lies in the antitrust laws (R. 801 n.13).

Acceptance of this view would leave some types of collective action under section 15 immune from attack under the antitrust laws if filed and approved [*cf. Carnation Co.* v. *Pacific Westbound Conf., supra,* 383 U.S. 213 (1966)], while similar conduct by the same persons and with the same effects would be outside the maritime statute and susceptible to challenge only under the Sherman Act. To determine in what category particular conduct falls would necessitate in every case an exhaustive administrative proceeding since no court would act on an antitrust complaint unless the Commission had decided the threshold jurisdictional question. Aggravating the situation would be the fact that the shipping lines, unlike ordinary businesses, can engage in

discussion and planning together in their section 15 bailiwick unhampered by the antitrust laws. Indubitably, they would be able to shape their conduct to come under one statute or the other as best suited the exigencies of the moment. For example, in this case, if the Commission's view were correct, inclusion in PMA's plan of an explicit provision to pass on the assessment would have brought the entire scheme under section 15; its exclusion would throw the matter under the antitrust laws.

As the Commission reads the statute, the public will be able to count on neither regulation nor prohibition to curb monopolies within the shipping industry. If this is not to occur and if the statutory scheme is to be effectuated, the Shipping Act must be read as being, at the very least, coextensive with the Sherman Act. Preferably, it should be read as written and as meaning what its plain language says.

No burden to the industry need be feared from reading the statute as written. At an early date the Commission ruled that purely "routine operations" need not be submitted for approval under section 15. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). Congress has acquiesced. H. R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962).

More recently the Shipping Act has been amended to permit "any class of agreements * * * or any specified activity" to be exempted from the requirements of the Shipping Act where "such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory or be detrimental to commerce." 46 U.S.C., section 833a (Supp. II).

Nor should concern be felt that recognizing PMA's arrangement to be an unfiled section 15 agreement may redound to the detriment of labor on the Pacific coast which in good faith has carried out its part of the underlying mechanization agreement. The agreement between PMA

and the ILWU is in no way affected by the legality or illegality of the method whereby PMA, acting independently, has raised the money to meet its obligations. What PMA will have to do is to bring its fund-raising activities into line with the requirements of the Shipping Act. With the cooperation of its membership, it should have no difficulty in doing so. But any difficulties it has created for itself should not serve as a reason for giving its collective action permanent immunity from the requirements of the law.

The difficulties and obscurities which for years have troubled the enforcement of the antitrust laws are now being introduced into the Shipping Act. In place of the *per se* rules laid down by Congress the Commission is mandating an elaborate evidentiary inquiry. Neither the shippers the Act was designed to protect nor the carriers it was to control can now be certain which agreements are subject to governmental surveillance and must be filed and approved before being put into execution, and which agreements need not, but are also ineligible for immunity from the antitrust laws.

We are not concerned here with a statute, like the antitrust laws, which condemns as illegal the agreements it covers, but with regulatory legislation whose purpose is not to prohibit the described arrangements but simply to ensure their submission to governmental scrutiny. Thus no harm can be caused by a liberal interpretation while great damage to the legislative intent can be done by an unsympathetic construction.

> "Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom [of particular statutory provisions] * * * is the concern of Congress, not of this Court. We leave the statute as Congress enacted it." *United States* v. *American Union Transp., supra,* 327 U.S. 437, 457 (1946).

II

The Commission erred in requiring under section 15 contractual commitments rather than a mere understanding among PMA's members.

Even under the Commission's reading of section 15 as limited to agreements affecting competition for the business of shippers, PMA's assessment program would have been covered had not the Commission compounded its original error by the narrow view it took of what constitutes an "agreement" for the purposes of section 15.

Not all competitive restraints imposed by collective action are the product of formal legally binding contracts. To make certain that the absence of explicit contractual commitments did not permit anticompetitive arrangements to escape administrative scrutiny, the drafters of the Shipping Act explicitly defined the type of arrangement which had to be approved before being placed in execution as embracing "understandings, conferences, and other arrangements." The breadth of the definition was designed to reach "gentlemen's understandings" as well as more explicit contractual arrangements. Alexander Report, 415. Thus, to come within the Shipping Act, collective action need not meet the requirements of a common-law contract. *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159, 186-191 (1962); *Unapproved Section 15 Agreements—Spanish/Portuguese Trade,* 8 F.M.C. 596, 607-608 (1965).

What the undisputed contemporaneous documentary evidence shows clearly and consistently is a collective understanding among everyone concerned, MTC (Ex. 9, R. 486, Ex. 32, R. 519), other PMA on-shore operators (R. 240-242, 626-627, 656) and PMA's staff (Ex. 11, R. 492-493, Ex. 21, R. 504, Ex. 55, R. 588-593), that it was part and parcel of PMA's program "to pass on all or a portion of its assessment to the carriers and shippers served by the terminal operators." Thus, even if the conditions

which the Commission states must be met for a section 15 agreement to exist were sound, they are all satisfied here. That the Commission concluded otherwise is due to the fact that it restricted itself to searching the record for contractual commitments rather than inquiring as to the nature of the "understanding" among PMA members.

No one is in a better position than MTC to know just what that "understanding" was. At every one of the meetings of PMA's members and directors when the assessments were formulated and approved, MTC was represented either by its President, C. R. Redlich, or its Vice President, Ellet G. Horsman (R. 369, 374, 378). It is significant, therefore, that when PMA sued MTC for the unpaid assessments on petitioner's cargo, MTC pleaded in defense "that the assessments for the benefit of the Mechanization Fund are made *on the understanding* that the employer can lawfully collect the amount of the assessment from the carrier or cargo owner for whom the employer performs the stevedore and terminal services" (emphasis added) (R. 26).

So far as PMA carrier members were concerned, the on-shore operator was simply a conduit, introduced into the arrangement as a formality for tax purposes only (pp. 13-14, *supra*). These members were directed to pay the PMA assessment to their stevedoring contractors even before the latter paid PMA (Ex. 55, R. 590). Of course, similar instructions could not be given non-PMA members like petitioner, but, nevertheless, it was as integral a part of PMA's arrangement that they would bear the cost of the assessments as that the carriers would. Any other course would have given chartered cargo preferential treatment over carrier-borne cargo. This scarcely would have recommended itself to an organization dominated by carriers.

Both the Examiner (R. 638-639, 651) and the Commission (R. 671, 675-676) have mistakenly viewed MTC's offer to absorb the mechanization assessment if placed

on a weight basis, in which event it would have amounted to about twenty-five cents, as showing that it was not part of the PMA program that the assessments be passed on. But there is in fact no inconsistency. The PMA assessments were not intended to interfere in any way with the customary negotiations by which a commodity rate is normally established between a stevedoring contractor and his customers, carrier or shipper. That in negotiating a new rate the PMA assessment would necessarily be included did not mean that the new rate would be the old rate plus the PMA assessment. The Mech Fund agreement was expected to reduce stevedoring costs, not increase them.

Thus one PMA carrier, as soon as the Mech Fund arrangement went into effect, "put [its] San Francisco stevedore on a cost-plus basis, as an emergency measure, to assure that any savings that came from his change of operations would accrue to us immediately" (R. 126). In short, even though the carrier paid the PMA assessment in its entirety, a new rate was established in the expectation that even with the "pass-on" of the PMA assessment the total would be less than before.

Since assessment of automobiles on a weight basis would have been roughly in line with the burden on other cargo, it is understandable that MTC were of the opinion that it would be able to absorb them, that is, continue to do business on the basis of the existing commodity rate relying on the savings from the underlying PMA-ILWU agreement to balance the PMA assessment.

But when PMA opted for the measurement ton basis, an absolute increase in the commodity rate became inescapable. The $2.35 assessment per vehicle could no longer be lumped with the other items entering into the commodity rate, but very visibly had to be "passed on," with MTC exposed as a "collection agency."

Like any "collection agency," MTC have never been required by PMA to remit any moneys which they could

not collect. MTC have yet to pay a single penny on petitioner's cargo (R. 18-27). In parallel fashion, the onshore operators discharging Army cargo paid no assessments on such cargo as long as reimbursement was not forthcoming (Ex. 21, R. 503-506, Ex. 2H, R. 357, Ex. 2F, R. 354, Ex. 31, R. 518).

Again, like a "collection agency," MTC have sought and received instructions from their principal regarding how petitioner is to be compelled to foot the bill. Significantly, as Commissioner Patterson points out, "the funds were not considered to be due from Marine Terminals" (R. 706).

It is a fair inference that the litigation finally brought by PMA against MTC is part of a common plan. When petitioner, impleaded by MTC, secured a stay, PMA's Board of Directors decided "that the Chairman will convene a meeting with PMA Counsel and stevedore Counsel to determine a course of action under the present situation" (R. 348). To Commissioner Patterson, the conduct of the litigation "underlines the point that respondents and PMA understood they were working together in a non-adversary arrangement to collect money due from 'outsiders' rather than from members" (R. 707).

The facts speak for themselves. The actions of PMA's members show that, in practice, "pass-on" and "payment" under the PMA plan are inseparable. Where pass-on has not been possible, nothing has been paid. Accordingly, had the Commission looked to what the "understanding" was between the parties, it would have found here just such an arrangement as it deemed critical, that is, one to pass-on to VW and other customers the PMA assessments.

Where anti-competitive arrangements are involved:

> "[J]udicial inquiry is not to stop with a search of the record for evidence of purely contractual

> arrangements. The Sherman Act forbids combinations of traders to suppress competition. * * * [W]hether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

See also *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

III

PMA's assessments violate section 16. The sole reason the Commission gave for dismissing petitioner's complaint under this section has since been repudiated by the agency.

For the reasons pointed out by the Solicitor General, the issues raised under sections 16 and 17 are ripe for adjudication, whatever disposition the Court makes of section 15 (Brief for the United States, 34).

Section 16 First in the most comprehensive and sweeping language forbids discrimination between shippers or cargo. It makes it unlawful for any common carrier by water or other person subject to the Act "either alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

PMA's assessments are covered by this language. For the same benefits all cargo receives from the Mech Fund, that is, the opportunity to effect labor savings, MTC, in conjunction with the other members of PMA, are charging automobiles from ten to one hundred times as much. Such a differential in the rate "charged for identical services and facilities" is "prima facie discriminatory." *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 303 (1937).

But petitioner's contention that section 16 had been violated was brushed aside by the Commission on the ground that to sustain its position VW is required to show that cargo in competition with its Volkswagen automobiles has been preferred (R. 675-676).*

Because the court below thought PMA's allocation reasonable, it found it unnecessary "to consider whether and under what circumstances a rate practice that is purely 'random' and *hence* inherently discriminatory may be challenged under Section 16 in the absence of a showing that competitive cargo has been preferred" (R. 801).

That question must be reached, however, if this Court agrees that the ruling made below regarding section 17 cannot stand. Moreover, the specific prohibition against discrimination in section 16 may be applicable even if, for purposes of section 17, the practices under attack are "reasonable." Obviously, the two provisions were not considered coextensive by the drafters of the Act or one would have been omitted.

If the section 16 issue is reached, the Commission's present position would appear to require that it admit error in its disposition of this phase of the case. A few short months after it handed down its decision here, "the

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* The Commission states that petitioner "itself admits that all of the relevant case law requires a showing that competitive cargo has been preferred to sustain an allegation of a violation of section 16" (R. 676). What we said in our brief to the Commission (p. 66) was in fact:

> "By administrative interpretation this broad prohibition has been narrowed as barring only differences between shippers of cargo in the same classification. * * *
>
> VW respectfully submits that there is no warrant in the legislative history of the statute for the narrow interpretation which has been placed upon its language. This interpretation we believe substantially defeats the legislative intent. All the reasons that establish a violation of section 17 by MTC show that section 16 has also been breached."

Commission comprehensively analysed the 'standing' problem with respect to Section 16 litigation and overruled the older cases which required a showing of competitive disadvantage as a condition precedent to litigation of a Section 16 claim." *City of Los Angeles* v. *Federal Maritime Comm'n*, D.C. Cir., No. 20,025, n.8 (Sept. 15, 1967). It firmly rejected the contention that "there must be a competitive relationship between the shipper or cargo allegedly preferred and the shipper or cargo allegedly prejudiced before a violation of section 16 First can be established." *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 544 (1966).

> "[W]hatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether preference or prejudice results from free time or free storage practices; for free time, like the forwarder's procurement of marine insurance, bears no relationship to the character of the cargo—it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in the particular cargo involved. The same holds true for storage made available at a flat charge per square foot regardless of what commodity is to be stored. In such cases unequal treatment has no place in a regulated industry. The equality required in situations of this kind is absolute and is not conditioned on such things as competition, proximate cause and the like. To the extent that the other cases may read as requiring the establishment of a competitive relationship in the situation here involved, they are overruled." *Id.* at 547.

In rejecting the competitive cargo requirement, the Commission was not breaking new ground. At no time was a showing that competitive cargo was preferred the universal requirement the Commission assumes. In fact, regulatory action under the Shipping Act has been successfully defended as necessary to prevent discriminatory practices outlawed

by section 16 without ever exploring what the impact of such practices was upon competition. *California* v. *United States, supra,* 320 U.S. 577, 581-582 (1944). At the urging of the Commission, the Court of Appeals for the Second Circuit has refused to read section 16 as requiring in all circumstances a "competitive relationship between two shippers who are charged different prices." *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n,* 337 F.2d 289, 299 (2d Cir. 1964), *cert. denied,* 380 U.S. 910 (1965). The court agreed with the position taken there by the Commission that a practice of "charging shippers disguised markups of widely varying amounts on substantially identical services, without justification [was] * * * prima facie discriminatory in a regulated industry." 337 F.2d at 299.

Although it would thus seem that the Commission has now clearly repudiated the crippling doctrine applied to the case at bar, the Solicitor General suggests that the agency's position in this case "is supported by the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), *United States* v. *Great Northern Ry. Co.,* 301 I.C.C. 21, 26-27, on which Section 16 of the Shipping Act is modeled." Brief for the United States, 35.

It is true that the Interstate Commerce Commission has employed language in some decisions suggesting that, absent impairment of competition, discrimination or preference do not violate the statute. But we have been unable to find that any court has ever reviewed this administrative interpretation. Nor, despite the breadth of the language sometimes found in its opinions, has the Interstate Commerce Commission made the existence of such competition indispensable. *Union Tanning Co.* v. *Southern Ry. Co.,* 25 I.C.C. 112 (1912); *Joseph A. Goddard Realty Co.* v. *New York, Chicago & St. L. R.R. Co.,* 229 I.C.C. 497, 501 (1938).

What seems to have happened is that a doctrine originally conceived as a liberalizing view, that is, that injury

to competition provides basis enough for invoking the protection of this section,* has become distorted over the years into an absolute requirement.

Should the Interstate Commerce Commission's doctrine itself ever come before the courts for review, it would, we believe, be condemned as irreconcilable with the language and purposes of the Interstate Commerce Act. As this Court has repeatedly observed, the Interstate Commerce Act "uses language of the broadest type to bar discriminations of all kinds." *Boynton* v. *Virginia,* 364 U.S. 454, 457 (1960).

Consistently with the broad purpose intended to be served by that act, section 3(1) has been invoked successfully to strike down preference or discrimination in circumstances where no injury to competition was conceivable. Thus, it was utilized to attack the free transportation of the private cars and office cars of other railroads. *Louisville & Nashville R. Co.* v. *United States,* 282 U.S. 740 (1931). Again, it was this section which ended discrimination in transportation services among interstate passengers. *E.g., Boynton* v. *Virginia, supra,* 364 U.S. 454 (1960). In the great majority of the cases in which it has been successfully employed, it would have been unavailable if read as requiring proof of injury to competition.

In a most persuasive opinion recommending that the competitive cargo requirement be repudiated for all purposes, Examiner Theeman points out how much it is at odds with the legislative history and objectives of the Shipping Act. *Investigation of Household Goods, North Atlantic Mediterranean Freight Conference,* F.M.C. Docket

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* *H & H Bates, Jr.* v. *Pennsylvania R.R. Co.,* 3 I.C.C. 435, 446-448 (1890), vacated on rehearing upon new evidence, 4 I.C.C. 281 (1890); *John P. Squire & Co.* v. *Michigan Cent. R.R. Co.,* 4 I.C.C. 611, 622-628 (1891).

No. 66-49 (Initial Decision, June 30, 1967). He was prompted to do so by the fear that the doctrine would impede disapproval of the enormous difference in the rates charged two separate government agencies for the same services, since the agencies do not, of course, stand in a competitive relationship with one another.

But whatever vitality the doctrine may still have in connection with ocean freight rates, the Commission itself, as earlier pointed out, has held it to have no place where the service being rendered "bears no relationship to the character of the cargo" and is "extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in a particular cargo involved." *Investigation of Free Time Practices—Port of San Diego, supra,* 9 F.M.C. 525, 547 (1966). The opportunity to effect labor savings is exactly of this character. For the same benefit which is being extended to all cargo, grossly disproportionate charges are being laid on automobiles, both relatively and absolutely.

The only conclusion possible on this record is that reached by Commissioner Patterson: "that there has been preference and advantage to traffic other than Complainant's property and disadvantage and prejudice to Complainant's property" (R. 716).

IV

PMA's assessments violate section 17 of the Shipping Act.

A

That a disfavored shipper receives "substantial benefits" does not make discriminatory treatment of him "just and reasonable."

Section 17 requires every person covered by the Shipping Act to "establish, observe and enforce just and reasonable regulations and practices." Parallel language

in the Interstate Commerce Act had been described as reaching "practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one." *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, 229 (1916).

Charges for stevedoring and terminal services of the character MTC render petitioner have repeatedly been examined under this section to make certain that shippers did not pay for services rendered carriers, or vice versa, that services and charges were related to one another, and that differences in transportation conditions justify differences in the rates charged. *California* v. *United States, supra*, 320 U.S. 577, 586 (1944); *City of Los Angeles* v. *Federal Maritime Comm'n, supra*, D.C. Cir., No. 20,025 (Sept. 15, 1967); *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922); *American Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923), *aff'd*, 31 F.2d 663 (2d Cir. 1929), *cert. denied*, 280 U.S. 555 (1929); *Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673 (1964); *Phillipine Merchants Steamship Co., Inc.* v. *Cargill, Inc.*, *supra*, 9 F.M.C. 155 (1965); *Investigation of Free Time Practices—Port of San Diego, supra*, 9 F.M.C. 525, 542 (1966); *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966). Indeed, accounting practices have even been reviewed to make certain that charges and benefits are related. *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

That petitioner's cargo is the subject of special and discriminatory treatment is established by the facts found by the Commission. The first is that automobiles pay substantially more than other cargo. On this the Commission found that general cargo, including automobiles, carries a higher assessment than bulk cargo or coastwise lumber

(R. 669-670).* Another finding is that automobiles are made the subject of special treatment: "although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis" (R. 677). The third relevant fact is that automobiles receive no greater benefits than any other cargo from the Mech Fund plan. The Commission found that "as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown" (R. 677).

But now the Commission declares, and the court below concurs, that section 17 does not mandate equality. It is enough that "substantial benefits" are present; that other persons, identically situated, are paying less for the same benefits is not unjust or unreasonable.

If some people can lawfully be charged more and other people less for the same services, what is prejudice? Or disadvantage? Or reasonableness? What does the statute proscribe, if anything? Only outright larceny, an exaction for which nothing is given in exchange, would seem to be banned.

The case cited by the Commission as supporting the inequitable doctrine which it now enunciates, *Evans Cooperage Co., Inc.*, v. *Board of Comm'rs of the Port of New Orleans*, 6 F.M.B. 415 (1961), in fact looks the other way.

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* In fact, the wholly uncontroverted evidence, on which the Commission failed to make any finding, establishes that, measured by the only available standards, *i.e.*, cost of labor and total cost of discharge, automobiles pay *ten times* as much, proportionately, as the next highest classification, *i.e.*, general cargo (*supra*, pp. 7-8). None of the conjectural possibilities referred to in a footnote by the court below affect this proof (R. 800-801 n.12). Significantly, PMA, despite its elaborate research staff and the extensive studies made by it in this area, was unable to produce any evidence that the burden on automobiles is not exactly as petitioner has always maintained—ten times as much as on other general cargo.

There, a uniform wharf tollage was sustained as to cargo not passing over the wharf because reasonably related benefits were received. Greater precision in equating benefits with burdens was waived by the Commission because "precise equivalence" was impossible. *Id.* at 419. This expressed preference for an exact correlation between benefits and burdens is the very opposite of a rule which would license whatever burden there is power to impose. Furthermore, the charge there was the same for all (*id.* at 416), whereas here what petitioner is complaining of is inequality in treatment to the point where its cargo has been made the subject of a special discriminatory rule.

Section 17 was placed in the statute to put an end to one of the specific types of abuse which investigation had revealed—unjust discrimination against individual shippers in connection with just such matters as terminal charges. Alexander Report, 292, 293, 410-411; 53 Cong. Rec. 8276 (1916). To require no more than that a shipper receive something in exchange for his money, without regard to how disproportionate the charge made is to what others are required to bear, is to render section 17 useless for the purpose for which it was designed.

Perhaps in recognition of this fact, the Commission suggested that it might reach a different result if malice were present.

> "An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another" (R. 677).

Nothing in the language of the statute or its past interpretation [*California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc.*, 8 F.M.C. 97, 103 (1964); *Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17, supra*, 7

F.M.C. 673, 675-676 (1964)] makes improper motivation an essential element of an "unjust or unreasonable practice." Undue preference or discrimination in land carriage is not precluded by the absence of "favoritism or malice." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 523-524 (1924); *Interstate Commerce Comm'n* v. *Chicago Great Western Ry.*, 209 U.S. 108, 122-123 (1908). This is not to say that intent may not be material; only that it is not an essential element, as the Commission would make it. Yet, even under the Commission's mistaken view of section 17, PMA's program should have been condemned. The record leaves no doubt that the discriminatory treatment of petitioner's cargo was the product of deliberate design. What else lies behind the decision, repeatedly reaffirmed, to make automobiles pay on the basis of measurement rather than weight, taken with full awareness of the resulting injustice and inequity? PMA intended exactly what it accomplished, to transfer to automobiles the financial burden which liner cargo should have been carrying.

But the Commission never passed upon PMA's motivation. It did not determine why PMA levied its assessments as it did. The Commission took the position that only MTC's actions in passing on the assessments were to be tested under section 17. The Examiner did the same: "[W]e do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement" (R. 653). That petitioner was challenging under section 17 not only MTC's pass-on of the assessments but also their initial imposition (R. 609, 664) was ignored.

Looking solely to what motivated MTC, the Commission had no difficulty in acquitting these companies of any improper design. Obviously, if the PMA assessment itself is insulated from review, MTC's action in passing this unavoidable cost element on to VW is not unreasonable. In short, the Commission applied the wrong test to the wrong persons.

B

The court below in affirming the Commission's decision invaded the administrative area.

When the court below came to review the results reached by the Commission, it recognized, as the Commission had not, that at issue was the PMA assessment itself.

> "We reject at the outset of our discussion of Section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment" (R. 795 n.8).

But since neither the Examiner nor the Commission had passed on the applicability of section 17 to "the method of computing the assessment," neither had considered whether it was consistent with the requirements of that section nor made findings or conclusions with regard thereto. So far as this issue was concerned, therefore, the case was not yet ripe for review. It should have been remanded to the Commission to give it an opportunity to consider this issue, to make its ruling and to state the reasons for its action. *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); *Interstate Commerce Comm'n* v. *J. T. Transport Co.*, 368 U.S. 81, 93 (1961).

Such a course was dictated by the rule "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Comm'n*

v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

In remanding the proceeding for further consideration, the court below could, of course, have indicated the principles by which the Commission should guide itself. What the court did instead was to examine the evidence itself and decide the issue which the Commission had avoided. Although the court does not spell out the legal principles it is applying, they clearly differ from those of the Commission.

First, the court makes it plain that it deems irrelevant what the agency considered of paramount importance. In clearing PMA's assessment of illegality, the court holds PMA's intent to be outside the case. It refused to consider as an issue before it petitioner's claim that it is being deliberately victimized by the common carriers dominating PMA (R. 801 n.13).

But at the same time, the court, in absolving of any violation of section 17 both PMA's system of assessment and the special treatment of automobiles, gives critical importance to the considerations which ostensibly led to the selection of the system of assessment employed. How then can the court exclude as an issue what the real reasons might have been?

In essence, the court finds PMA's system of assessment "not unreasonable" because other alternatives had been considered and rejected, revenue tonnage had previously been used for dues purposes and administrative simplicity was a cardinal consideration. The treatment of automobiles is cleared of unreasonableness on historical grounds. The court finds "substantial evidence" that PMA intended to allocate charges on the same tonnage basis as had been used for PMA's dues and it apparently concludes that this meant measurement tons so far as automobiles are concerned.

How the system operated in practice is virtually ignored. The disproportion between benefits and burdens with regard to automobiles found by the Commission is mini-

mized and brushed aside: "[A] generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disapproportionate to benefits" (R. 801).

The premises upon which the court's opinion rests are as destructive of section 17 as those applied by the Commission. Whether a shipper is the victim of an unjust and unreasonable practice should be determined by what is happening to him, not by what good reasons those victimizing him have for discriminating nor how long they have been doing so unchallenged. In the words of Mr. Justice Brandeis: "Self-interest of the carrier may not override the requirement of equality in rates." *United States* v. *Illinois Central R. Co., supra,* 263 U.S. 515, 524 (1924). "Commercial convenience cannot justify a practice which is otherwise unreasonable." *Investigation of Free Time Practices—Port of San Diego, supra,* 9 F.M.C. 525, 541 (1966).

But even under the standards employed by the court below the results it reaches are indefensible.

The question is not what PMA's reasons were for electing to raise the Mech Fund by means of a tonnage tax, but why, in tailoring that tax to the peculiarities of petitioner's chartered shipments, did PMA select from among the available alternatives the most burdensome and inequitable, a tax based upon measurement tonnage. It is not the general rule, the decision to assess upon the basis of manifested tonnage, but the special rule unique to automobiles, to assess upon the basis of measurement tonnage regardless of what the manifest showed, which is the source of the injustice being done petitioner. Therefore, if subjective considerations are to be deemed controlling, as the court below apparently believes, what is critical here is not why the general rule, but why the special rule, was adopted.

The explanation will not be found either in administrative convenience or in historical considerations. Administrative convenience would have been equally served by a tax on Volkswagen automobiles based on weight as by one using measurement, which would have equalized the burden as between automobiles and other general cargo. Furthermore, where it suited PMA to change its formula as in the case of coastwise lumber, administrative inconvenience posed no impediment.

Turning to past practices, there was scant historical precedent for the general rule, let alone the special one. Generally, the cost of a fringe employee benefit was distributed on the basis of man hours, not tonnage (Ex. 5A, p. 3, R. 468, 69-71). PMA's own membership dues were predicated on a combination of man hours and tonnage in a sixty-forty ratio (Ex. 5A, R. 473). And whatever PMA advised its members in 1958, unit and weight were being used, as well as measurement, in calculating these dues when the Mech Fund went into effect (pp. 8-9, *supra*). The letter sent PMA members after the Fund was voted, directing the recalculation of past membership dues using measurement rather than weight, appears to rewrite, rather than reflect, history (*ibid.*). But even if PMA's special rule for automobiles were laid down as early as 1958, this would scarcely prove reasonableness since in 1958, just as in 1961, the carriers dominating PMA had good reason for discriminating against petitioner. Discrimination gains no sanctity by repetition. Finally, history and how membership dues had been paid in the past no more inhibited PMA when it cared to act, as in the case of scrap metal (Ex. 35, R. 522), than did administrative inconvenience.

In short, PMA's discrimination was engaged in "without reference to an adequate determining principle or standard" and was, therefore, necessarily both unjust and unreasonable. *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 889 (S.D.N.Y. 1951), *aff'd sub nom., A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.,* 342 U.S. 950 (1952).

C

PMA's plan violates section 17 because no transportation conditions justify the discriminatory treatment of petitioner's cargo.

The error into which the court below fell was in not recognizing that the test of compliance with section 17 is an objective one. What the statute condemns is any difference in rates "not justified by the cost of the respective services, by their values, or by other transportation conditions." *Atlantic Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 249-250 (1932). If judged by the transportation standard a rate is discriminatory and inflicts undue prejudice, it comes within the ban of the statute though honestly motivated. *California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc., supra,* 8 F.M.C. 97, 103 (1964). This is exactly the construction placed on the Interstate Commerce Act. *United States* v. *Illinois Central R. Co., supra,* 263 U.S. 515, 523-526 (1924).

The Mech Fund is a fixed sum paid for the privilege of effecting labor savings. Presumably, PMA considered the bargain a good one or it would not have made it, that is, it thought the savings the agreement would permit would outbalance its cost. Five million dollars a year represented approximately five percent of the total waterfront labor bill (p. 7, *supra*).

In short, PMA was willing to experience an immediate increase in labor costs of five percent in exchange for the benefits the Mech Fund would bring. To require petitioner to suffer an increase of over fifty percent in labor cost for the same benefits is inequitable on its face. The savings made possible by the Mech Fund are most unlikely at any foreseeable time in the future to reach, let alone exceed, $2.35 per car, the amount of the tax laid on each of petitioner's vehicles.

In the case of other commodities, such as bulk cargo or scrap metal, where the amount of direct labor used was already low, PMA on its own initiative reduced the amount of the assessment to one-fifth that on other cargo, in recognition of the fact that, by necessity, potential labor savings were relatively small (p. 11, *supra*). Nothing prevented a similar adjustment of burdens to benefits for automobiles. All that was required was that weight tonnage be substituted for measurement tonnage when a special rule was promulgated for automobiles.

Even before petitioner objected, PMA's Board of Directors apparently recognized automobiles to be a commodity, like scrap metal, which its "rough-and-ready" formula did not fit (Ex. 2N, p. 2, R. 370). In the case of both, labor costs were already low and there was comparatively little opportunity for further saving (compare R. 78 with Ex. 10, R. 488). Such considerations led to a reduction in the rates on bulk cargo and scrap metal (R. 77-78). If automobiles on the contrary have been made the subject of a particularly onerous special rule, despite petitioner's repeated and well-documented protests, it is because if automobiles pay more, other cargo pays less. By forcing automobiles to contribute more than their *pro rata* share to the five million dollar annual toll for the Fund, PMA's membership are subsidizing their own operations. If chartered cargo bears a disproportionately large share of the cost, liner cargo pays that much less.

Just such egregious manipulation of costs and benefits as is present here has been condemned as unjust and unreasonable. *Practices, Etc. of San Francisco Bay Area Terminals, supra*, 2 U.S.M.C. 588 (1941), *aff'd sub nom., State of California* v. *United States*, 46 F. Supp. 474 (N. D. Cal. 1942), *aff'd*, 320 U.S. 577 (1944); *Investigation of Certain Storage Practices, supra*, 6 F.M.B. 301, 315-316 (1961); *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182-184 (1960); *California Stevedore & Ballast Co.* v.

Stockton Elevators, Inc., supra, 8 F.M.C. 97, 105 (1964). *Cf.*: *City of Los Angeles* v. *Federal Maritime Comm'n, supra,* D.C. Cir., No. 20,025 (Sept. 15, 1967).

PMA's assessments violate section 17 because they compel petitioner's cargo to carry a burden which properly belongs elsewhere.

CONCLUSION

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *N.L.R.B.* v. *Brown, supra,* 380 U.S. 278, 291-292 (1965).

For the foregoing reasons the judgment below should be reversed with directions to set aside the Commission's order.

Dated: September, 1967.

Respectfully submitted,

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Appendix

The relevant provisions of the Shipping Act of 1916, 39 Stat. 728, as amended, 46 U. S. C., sections 801, *et seq.*, are as follows:

Section 1, 46 U. S. C., section 801.

When used in this chapter:

* * *

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * *

Section 15, 46 U. S. C., section 814.

* * *

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner pro-

viding for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations * * *.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation. * * *

* * *

Section 16, 46 U. S. C., section 815.

* * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * *

Section 17, 46 U. S. C., section 816.

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

U.S.C., section 706 [formerly section 10(e) of the Administrative Procedure Act (60 Stat. 237)], reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, at the pertinent periods were as follows:

When the Shipping Act was enacted in 1916, section 5, 24 Stat. 380, read as follows:

That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

At the time of the decision in *Kennedy* v. *Long Island R.R. Co.*, 211 F. Supp. 478 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963), section 5 [renumbered as section 5(1)] read as follows:

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises * * *.

Section 5b, added in 1948, 62 Stat. 472, reads, in part, as follows:

* * *

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment) or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission

may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

* * *

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

Section 412 of the Federal Aviation Act (49 U.S.C., section 1382) provides as follows:

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserv-

ing and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC MARITIME ASSOCIATION and MARINE TERMINALS CORPORATION,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

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BRIEF ON BEHALF OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AS AMICUS CURIAE IN SUPPORT OF JUDGMENT BELOW

This brief, filed pursuant to written consents obtained from all parties as required by this court's

Rule 42(2), is submitted by International Longshoremen's and Warehousemen's Union (herein the union) as amicus curiae in support of the judgment below.

The interest of the union is manifest from the record. The employees represented by it are the persons for whose benefit the moneys involved in this case (herein the Mech Fund) are collected. If these moneys are not collected and do not get into the Fund, the employers, represented by Pacific Maritime Association (herein PMA), will be unable to fulfill their contractual obligations to the employees.

Indeed, the collective bargaining contract between the union and PMA provides that "in the . . . event *any portion* of the Plan is held unlawful *under any law* by any decision of any court," the obligations to PMA "to continue to accumulate the Mechanization Fund" and of the employers "to pay further contributions" to it "shall be immediately suspended." (EX 1-C, Article VI, Section 9; R. 308a; italics supplied).

In these events, the union, as the collective bargaining representative of the employees, would have to treat the contract as nonexistent and might have to resort to economic self-help to obtain a new and "lawful" contract.

It is in order to urge upon the court that it eschew an interpretation of Section 15 of the Shipping Act (46 USC 814) which could lead to such results, that the union files this brief.

1. **THE MECH FUND IS PART OF ONE OF THE MOST SIGNIFICANT ADVANCES IN AMERICAN COLLECTIVE BARGAINING.**

The stormy history of labor relations in the Pacific Coast longshore industry is sufficiently well-known to require no extensive elucidation in this brief. It may be sufficient for present purposes to quote from a paper by the Director of the Western Regional Office of the Bureau of Labor Statistics of the Department of Labor:

> The bitterness which had characterized the industry [prior to the 1934 general strike] carried over into the subsequent employer-union relationship. The employers did their best to break the union, and the union retaliated just as militantly. The years which followed were among the stormiest in U.S. labor history. Between 1934 and 1948, the West Coast had over 20 major port strikes, more than 300 days of coastwide strikes, about 1,300 local job action strikes, and about 250 arbitration awards.[1]

One of the principal issues around which many of these battles were fought was the employers' desire to do away with certain work practices upon which the union had long insisted: limitations on the size of cargo loads to be handled, requirements that longshore gangs contain a certain minimum number of men, and the like. To the employer such practices meant low productivity and increased cost; to the union they meant more jobs for more men. For many

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[1]Kossoris, *Working Rules in West Coast Longshoring*, 84 MONTHLY LABOR REV. 1 (1961). See also Killingsworth, *The Modernization of West Coast Longshore Work Rules*, 15 INDUSTRIAL AND LABOR REV. 295 (1962).

years, there seemed no way out of the impasse thus created by a powerful employers' association confronting a powerful union on this issue.

Finally, beginning in 1948, the possibility of an accommodation became discernible due, in large measure, to a change in employer leadership and to an awakening recognition that the men were entitled to share in the economic gains which the employers would obtain by new methods of operation (R. 191a). Ultimately, the union leadership came to recognize that, while the union might continue to wage guerrilla warfare against mechanization, it would be in the long-run interests of the men to accept the inevitable and to attempt, by collective bargaining, to procure a fair share of the savings which new technology would make possible (R. 187a-189a).[2]

With all the good will in the world, however, it was to take years of careful, responsible collective bargaining (and on both sides an education of reluctant members)[3] before a significant approach could be made to the problem.

As a result of a slowly growing feeling of mutual trust and confidence, the parties began in the 1950s to explore ways and means of increasing productivity

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[2]Fairley, *The ILWU-PMA Mechanization and Modernization Agreement*, 12 LABOR LAW J. 664, 667 (1961).

[3]Horvitz, *The ILWU-PMA Mechanization and Modernization Agreement: An Experiment in Industrial Relations*, PROCEEDINGS OF THE SIXTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, No. 32, p. 22; Fairley, *The ILWU-PMA Mechanization and Modernization Agreement, An Evaluation of Experience Under the Agreement; The Union's Viewpoint*, PROCEEDINGS OF THE SIXTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION, No. 32, p. 34 (1963).

(and thereby of increasing shipping on the West Coast), while at the same time retaining for the workers the economic advantages which they had won through the restrictive work practices.

The resulting labor management contract, of which the Mech Fund is the very heart, represents a historic advance in American collective bargaining.

The Court below noted that

> This fund was . . . to be used to cushion the effects of higher production upon longshoremen and marine clerks displaced by mechanization. . . . The necessity for the fund itself is not here in controversy; in fact, all parties agree that it serves a salutary purpose. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 371 F. 2d 747, 749 (C.A.D.C. 1966).

The director of the Department of Labor's Western Regional Office of Labor Statistics, heretofore quoted, has observed

> Employers gain a free hand in managing their business, and the union gains the security of a guaranteed wage and the vested right benefit through a share of the savings accruing from the modernization of the industry. And significantly, this result was achieved in peaceful, intelligent discussions across the negotiating table.
>
> Other industries may find it possible to develop variations of this approach in solving their own work-rule problems. The significance of the West Coast longshore development lies in the fact that it demonstrates that management can resolve this difficulty by giving labor a share in the gains

> brought about by rapid technological change, while at the same time safeguarding worker security. This generally untried approach to meet the effects of increased mechanization and automation deserves close attention.[4]

An eminent professor of labor and industrial relations notes that

> The principal lesson which seems to emerge from the West Coast longshore experience is that, with a spirit of mutual acceptance and with some common understanding of their mutual problems, employer and union representatives can achieve the difficult feat of fundamentally revising their mode of accommodation without outside help; but they must expect to spend months and years at the task.[5]

The National Labor Relations Board, the government agency most directly involved in this area of national policy, has recognized that

> The automation concord . . . has been widely acclaimed as a history-making precedent, a peaceful settlement of a problem which has troubled the West Coast waterfront for a number of years. *International Longshoremen's and Warehousemen's Union (American Mail Line),* 144 NLRB 1432, 1442 (1963).

And

> . . . the . . . agreement . . . constituted a pioneering settlement . . . of the larger manpower and economic problem resulting from the increasing

---

[4]Kossoris, supra, n. 1, at 10.

[5]Killingsworth, supra, n. 1, at 306.

> use of mechanized equipment on the waterfront. *International Longshoremen's and Warehousemen's Union (Albin Stevedore Co.),* 144 NLRB 1443, 1448 (1963).

And

> . . . this agreement is a pioneer settlement between PMA and [ILWU] of manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront and may well serve to promote industrial peace in this area of American industry. *International Longshoremen's and Warehousemen's Union (Howard Terminal),* 147 NLRB 359, 366 (1964).

Finally,

> The primary objective of that [mechanization] agreement, as the Board has recognized, was to lighten the impact of unemployment upon longshoremen created by the increased use of mechanized equipment in longshore operations, and thereby promote industrial peace in this area of American industry. *United Industrial Workers of North America (Albin Stevedore Co.),* 162 NLRB No. 96, 64 LRRM 1118, 1120 (1967).

The national labor policy favoring the settlement of these difficult problems by free collective bargaining requires that this court approach the collective bargaining contract here involved with the most sympathetic understanding and that it not permit a farfetched application of a statute designed to deal with entirely different problems to work a frustration of what the parties have attempted to accomplish here.

It certainly is not within the spirit of the Shipping Act, nor was it the intention of its authors, to embarrass, impede or frustrate collective bargaining. Therefore, even if the words of the Shipping Act should be held unambiguously to embrace the formula devised by PMA to raise the money to meet its collective bargaining obligations, that "does not end inquiry into Congress' purpose" in enacting the Shipping Act. *National Woodwork Manufacturers Association v. National Labor Relations Board,* 386 US 612, 619 (1967).

The national policy which, on the one hand, encourages collective bargaining (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USCA 151) and which, on the other, is vitally concerned with solutions to the problems created by the increasing mechanization of American industry (Manpower Development and Training Act of 1962, 76 Stat. 23, 77 Stat. 422, 42 USCA 2571), requires that the Shipping Act not be construed or applied in a way which will defeat those objectives.

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2. IT IS UNREALISTIC TO SUGGEST THAT THE FINANCING OF THE MECH FUND IS NO PART OF THE COLLECTIVE BARGAINING RELATIONSHIP BETWEEN THE PARTIES.

It is conceded by the Solicitor General that if the financing formula had been spelled out in the collective bargaining contract establishing the Mech Fund, the Shipping Act would have no application to this case (Brief for the United States, 31). The fact

that the parties left it to one of them to devise methods of financially implementing their collective bargain[6] does not change the character of what is involved.

Such a procedure in collective bargaining is not unique to the Pacific Coast Longshoremen's Mech Fund.

> Q. Mr. St. Sure, from your experience, do you know of other situations in other industries where a fringe benefit plan has been negotiated with the union and the method of raising this fund to take care of that fringe benefit was in the negotiations reserved to the employers? A. Well, the most nearest parallel that I can think of, and I have represented department store groups in the joint bargaining, and the same thing has occurred I think in the milk industry where in bargaining for a welfare plan or a pension plan where you put a group of employers into a single package, and you have one employer who has been in business for ten years and one who has been in business 50 years, you necessarily have a different experience rating based upon the age group in the separate plants.
>
> An old employer may have a work force which is an average of 50, and the new employer may have an average cost of providing a hundred pensions, for example. These costs are quite differ-

[6]The Solicitor himself recognizes that what happened was that "the Association's board of directors determined *to implement the* [collective bargaining] *agreement* by assessing each member an annual rate for each ton of cargo handled. . . ." He further states that a question presented by this case is "wherever *the implementation of the employers' agreement* for allocating the cost of the mechanization fund . . ." comes within the scope of the Shipping Act (Brief for the United States, 2; italics supplied).

ent. The same is true with regard to welfare plans where age or sex will make a difference in the experience rating of a particular welfare item.

In these situations it is frequently done, and I have negotiated agreements where the employer agrees to guarantee a set of benefits and says to the union, "We are not going to tell you what the contribution is. We are going to provide within ourselves the method of providing the premium or the money required."

And then the employers themselves literally divide amongst themselves on an equitable basis how this money should be raised, which is not a part of the union contract.

The contract is to provide the benefit (R. 215a).

In this case the agreement with the union was that PMA would devise a funding method which would assure collection of the money consistently with the overall objective of revitalizing the industry. (R. 210a-212a). The agreement (EX 1-C, Article II, Section 2; R. 284a) specifically provides that employers who are members of PMA shall contribute to the Mech Fund "in the amounts and at the rates" set forth in the agreement, pursuant to the method developed by PMA under the power reserved to it "to adopt and change the method, manner and amount of collecting contributions." *Thus, it was part of the collective bargain itself that each employer would abide by the formula adopted by the Association.*

The agreement that each employer would comply with the Association's formula and not seek to upset it, thereby jeopardizing the whole enterprise, was the

quid pro quo for the union's agreement not to insist upon writing any formula into the contract. It was a concession which the union made in good faith when presented with the employers' desire that, at least at the beginning of the mechanization program, no fixed formula be written into the collective bargaining contract in order to preserve such flexibility as might be required for the future.[7] In making this concession, the ILWU was fully aware, as a consequence of two years of negotiations, that the employers would be limited to use of man-hour or tonnage assessments, or combinations of each, in funding of the Plan. (R. 210a).

If one shipper may upset these collective bargaining arrangements by utilizing a strained interpretation of the Shipping Act, then the entire agreement is undermined and the door is open to similar action by other shippers, with the result that shambles may be made of the industry-wide financing of the Mech Fund.

If VW succeeds in upsetting the formula, then, competition being what it is, every other importer of automobiles may be expected to attempt to do likewise. And if automobile importers may do so, why should not other shippers try also?[8]

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[7]Petitioner recognizes that, "Fear of a union take-over of the system of assessment played a large part in the committee's deliberations and was an important factor in the decision not to use the alternatives considered." (Brief for Petitioner, 6.)

[8]An employer spokesman has noted that the plan was possible only because the employers were willing to ignore their "diversity of interest in so many areas" and "unite in an attack on a common cost problem". Horvitz, *supra*, n. 3, at 23.

Thus viewed, it is clear that the method of raising the money for the Mech Fund is an integral part of the collective bargaining process and requires the protection which the Solicitor concedes is to be accorded to a contract resulting from that process. The Solicitor is in grievous error in suggesting that, while the underlying collective bargaining contract is exempt from the provisions of the Shipping Act, its direct implementation is not so exempt, because, he says, it is not a part of the collective bargain.

This court has insisted that "within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed". *Local 24, International Brotherhood v. Oliver,* 358 US 283, 295 (1959).

The financing of the Mech Fund is properly a subject of collective bargaining concern and the union had, and still has, a continuing interest therein.

> Q. Mr. St. Sure, once that agreement was reached with the union, was the situation that the union lost all interest in the method of collection? A. No.
>
> Q. Or would you say there was a continuing interest? A. There was a continuing interest and a continuing concern as to whether or not the collections under the fund were being met. Obviously they have, by joint trusteeship, joint custody of the fund, and I can assure you that they were alert as to whether or not the method of the custody, was working, because they believed this and, in fact, knew it was their money to spend in accordance with the agreement. (R. 211a).

* * * * * * *

> Q. Supposing that the PMA had adopted a system that, let's say, would result in abolishing whole segments of the industry, what would you think would have then been the union reaction? A. I am quite sure that if any agreement had been reached which would have brought about such a result, we would have an obligation, and I am sure the union would insist upon it, *to reopen the bargaining and to resume the bargaining as to the means by which the funds were to be collected.*
>
> After all, *this was a continuing relationship* that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations. (R. 212a; italics supplied).[9]

The record reveals that, on its side, PMA treated the financing of the Fund as an integral part of the collective bargaining process. It is significant that the committee utilized by PMA to establish the funding formula was a subcommittee of its collective bargaining negotiating committee and that the member-

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[9]The execution of the collective bargaining contract does not terminate the collective bargaining relationship. Section 8(d) of the National Labor Relations Act, as amended (29 USCA 158 [d]); *National Labor Relations Board v. Sands Manufacturing Co.* (1939), 306 US 332, 342; *The Crescent Bed Company, Inc.* (1966), 157 NLRB 296; Cox, *Law and the National Labor Policy* (INSTITUTE OF INDUSTRIAL RELATIONS, UNIVERSITY OF CALIFORNIA, 1960) 79. Compare Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490 (1959); Howard, *Labor Management Arbitration*, 21 MO. L. REV. 1, 25 (1956).

ship's ratification of the collective bargaining contract and its adoption of the funding formula occurred "at the same time". (Brief for Petitioner, 6; see R. 216a-217a).

In order to accomplish this internal determination *as a part of the ultimate bargain,* the Coast Steering Committee, *which is and was the negotiating group,* named a subcommittee which is the Peter Teige Committee, and instructed that committee to consider the question of a method of collection, having in mind the various arguments that had been going on within the membership of PMA to make a recommendation which could be presented to the board of directors by the first of the year, and that in turn then presented to the membership of PMA for ratification.

Q. Was the fact that the Coast Steering Committee was a negotiating committee, did that fact have any bearing on why it was appointed as it was? A. Well, *this was still part of the bargaining process. We were still actually trying to conclude the bargain which we had developed and had signed a memorandum to cover.* We still had the responsibility *as a negotiating committee* of reporting back to the board of directors, and then to the membership, and this was simply a convenient means of calling in some men that we felt were more expert in this field than the negotiators were who were operating people to make a recommendation as to a method of payment. (R. 216a; italics supplied.)

The closeness of the relationship between the collective bargain and the method used by PMA to finance the fund is shown by the fact that the tonnage

formula ultimately adopted is the identical one proposed by the union in negotiations (R. 210a) and follows the established industry method of distributing various labor contract costs: dispatch hall, arbitration expenses, and the like (R. 217a-218a). No special arrangements were made in this case that PMA had not made in all other cases in which it was necessary to spread labor costs. (EX. 5-A; R. 466a-474a.)

It must also be noted that the employers themselves recognized,

> There is no gainsaying the fact that some operators are in a better position to take advantage of the agreement than are others. However, there is a wide variety of opportunity and advantages are fairly evenly divided, for the operator who relies heavily on technology must also make heavy capital outlays which are largely irrevocable commitments. Those whose operations have limited technological opportunity can and do devote their efforts in other areas of relief from restriction granted by the agreement.[10]

However this may be, the overall gain to the industry is seen in the conclusion drawn by the same employer spokesman.

> Most of the employers I think recognize that there has been a fundamental shift in attitude on both sides despite the problems and a mutual recognition of the need for change and the complementary obligation to share the gains of progress. Shifts in attitude, problem solving rather

[10]Horvitz, *supra*, n. 3, at 24.

than conflict bargaining, reduction of resistance to change, the substitution of law for jungle warfare are trite and familiar phrases in labor relations but they are applicable to present relations between the employers and the longshore union on the West Coast. Whether it be the relatively smooth introduction of new equipment, or a marked improvement in vessel turn around time because of more efficient utilization of labor on ship and on shore, these things are part and parcel of a total framework constructed on a base of the M & M Agreement. In the view of most of us, this total framework is the real essence of the agreement and our hope for the future of the industry.[11]

It is clear that the financing of the Mech Fund is an integral part of the collective bargaining contractual relation between PMA and the union and is entitled to precisely that protection which the Solicitor General would accord to the formal written collective bargaining contract itself.

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3. THE PRE-EMPTIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS ACT PRECLUDES THE APPLICATION OF THE SHIPPING ACT TO THIS CASE.

It is true that everyone involved, including Volkswagen (Brief for Petitioner, 2) is loud in commendation of the Mech Fund and the purposes it seeks to accomplish. The fact is, however, that if petitioner is sustained here, then, for all practical purposes, the Fund may as well be jettisoned. If an arrangement

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[11] *Id.*, at 33.

by which employers implement and carry out their collective bargain is subject to the Shipping Act, then, as a practical matter, the collective bargaining contract itself cannot be put into effect without the prior approval of the Maritime Commission.

Such a result is directly at war with Congress' objective in confiding "primary jurisdiction" in labor relation matters to "a specific and specifically constituted tribunal", i.e., the National Labor Relations Board. *San Diego Building Trades Council v. Garmon,* 359 US 236, 245 (1959).

If the Maritime Commission, contrary to its own order, is directed by this court to require the filing and approval (or disapproval) of the funding arrangement, a potential for conflict between it and the Labor Board is immediately created.

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . ." *Garner v. Teamsters Union,* 346 US 485, 490 (1953).

The fact that the Shipping Act contains "heavy civil penalties" (Brief for the United States, 17) only aggravates the problem. In striking down a state's award of damages in a matter within the pre-emptive jurisdiction of the Labor Board, this court has said:

> "The obligation to pay damages can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon,* 359 US, at 247.

If this court holds that the financing of the Mech Fund is subject to the Shipping Act, then that Act's "heavy penalties" will serve as a powerful deterrent against the making of the payments called for by the collective bargaining contract.

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4. A REVERSAL OF THE JUDGMENT BELOW WILL HAVE A SIGNIFICANTLY DIRE EFFECT UPON THE OPERATION OF THE MECH FUND.

If this court holds that the collection of the fund must be suspended pending approval of the PMA formula under Section 15, the effects upon the West Coast longshore industry will be disastrous. Not only may the employers assert that the past payments they have made were invalid,[12] but, under such a holding, PMA will surely have no funds with which to make future payments and Volkswagen's bland assertion that a holding in its favor will not redound "to the detriment of labor on the Pacific Coast" (Brief for Petitioner, 73) is utterly without foundation in the record.

To the contrary, thousands of dockworkers who were induced by the agreement to retire early will not receive the checks which they expect each month.

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[12]The Solicitor may "assume" that PMA members will not seek restitution for past payments if those are judged to be invalid (Brief for the United States, 10), but the longshore industry on the Pacific Coast can hardly operate on the basis of such an unfounded assumption by one not even privy to the affairs of PMA. Moreover, many substantial customers of PMA members, such as the Army, not being members of PMA, are not precluded from seeking restitution of (unlawful) charges included within their cost-plus rates.

This result derives from the fact that the agreement expressly precludes prior funding of the existing benefit trust, i.e., transfer to the trustees of any moneys "which are not required by said Trustees for *immediate* payment of" obligations owed vestees (EX. 1-C; Art. IV[b][3]; R. 291a; italics supplied). The trust res consists solely of the contract right of the trustees to demand from PMA, as collecting agent of contributing employers, the requisite funds to meet *current* obligations (now $2.20 per month per individual) owed retired employees. If PMA has no lawful means of collecting funds for transmittal to the trustees until the Commission has acted after a hearing, the trustees must default in their obligation to the retired dockworkers. Nor may PMA use funds already in its possession if the funding method is declared unlawful until approved under Section 15. The agreement expressly provides that PMA acts solely as collecting agent for the contributing employers and all moneys within PMA's possession, which are designated as the "Mechanization Fund" (EX. 1-C; Art. I §9; R. 283a), belong to each such employer pro rata until the moneys are transferred by PMA to trusts employed to effectuate the Plan. (EX. 1-C; Art. II §2[d]; R. 285a-286a). Hence, if the contributions have been received by PMA under a formula unlawful until approved by the Commission, PMA as an agent must return to each principal its share of the Mechanization Fund and not divert any portion of the illegally accumulated Fund to the trustees for payment of benefits to the retired dockworkers.

Considering that there are now thousands of longshoremen who have already retired under the plan and who weekly rely upon their Mech Fund checks, such a situation will create a most disturbing reaction in the West Coast shipping industry.

Since the opinion of the Federal Maritime Commission and the judgment of the court below have established that the construction of the Shipping Act contended for by petitioner, and which could lead to the results here indicated, is not required as a matter of law, and, in any event, is not supported by the record, that construction should not be adopted by this court. The intrusion of the Federal Maritime Commission into areas reserved for the National Labor Relations Board should not be permitted by this court—particularly over the objections of the Commission itself.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated, San Francisco, California,
October 24, 1967.

Respectfully submitted,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC MARITIME ASSOCIATION AND MARINE TERMINALS CORPORATION, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (R. 779-801) is reported at 371 F.2d 747. The report of the Federal Maritime Commission (R. 666-728) is printed at 9 F.M.C. 77.

JURISDICTION

The judgment of the court of appeals (R. 802) was entered on December 22, 1966. The petition for a

writ of certiorari was filed March 20, 1967, and granted June 12, 1967. (R. 803). The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254(i) and 2350(a) (Supp. II).

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 *et seq.*, are set forth in the appendix, *infra*, pp. 34-37.

QUESTIONS PRESENTED

1. Whether all agreements of any nature among persons or parties covered by the Shipping Act, 1916 (46 U.S.C. § 814) must be filed with the Federal Maritime Commission?

2. Was there a rational basis for the Federal Maritime Commission to rule that this agreement was not an agreement of the type required to be filed for approval under section 15 of the Act?

3. In the absence of sufficient substantial evidence to convince the Commission that the method of fund collection constituted unreasonable prejudice in violation of section 16 of the Act and an unreasonable practice in violation of section 17 of the Act, is the Commission's finding of no violation reversible?

STATEMENT

The relevant facts detailed in the decision of the Commission's Hearing Examiner (R. 611-56), the Commission's report (R. 666-728) and the decision of the court of appeals (R. 779-801) are largely uncon-

tested. Rather, petitioner and the United States dispute the conclusions drawn from those facts by the agency and court.

1. The Parties

Volkswagen. Petitioner manufactures Volkswagen automobiles and was shipping about 40,000 Volkswagens a year to United States Pacific Coast ports in 1961 and 1962. Seventy to seventy-five percent were transported on vessels chartered by Volkswagen; the remainder on common carriers. (R. 614).

Pacific Maritime Association. Pacific Martime Association (PMA) is an incorporated non-profit organization of about 120 employers engaged in operating steamships, operating as stevedores in the various ports on the Pacific Coast, and operating ocean terminals. (R. 179, 616). The function of PMA is to bargain collectively in behalf of its members with Pacific Coast maritime unions, and administer and implement the labor contracts. (R. 179, 616, 667). Collective bargaining between PMA and the labor unions is subject to the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board, pursuant to 29 U.S.C. § 141 *et seq.* Contracts negotiated by PMA are binding on all members unless they withdraw from the organizations within seven days. (R. 397).

Corporate power is vested in a twenty-one man Board of Directors selected from member representatives of eight geographical or functional groups defined in the By-Laws. (R. 381, 383-86). To finance PMA's operations and obligations under the labor

contract the Board is empowered to fix and levy cargo, shipping and payroll dues and assessments upon members. (R. 404).

Marine Terminals Corporation. Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (MTC) are two PMA members. MTC furnishes ocean terminal and stevedoring services at San Francisco and Long Beach piers for both common and contract carriers. Generally, terminal services include certain clerical functions and the sorting, checking and the storage of cargo on the piers; stevedoring basically consists of the actual cargo loading and unloading by longshoremen. (R. 615). Volkswagens are among the cargo handled by MTC.

2. The Mechanization fund

PMA began negotiations in 1957 with the International Longshoremen's and Warehousemen's" Union (ILWU) regarding mechanization and utilization of labor saving devices on the piers. (R. 618, 244). A "Memorandum of Understanding" (Ex. 1-A; R. 243) was signed on August 10, 1959, reflecting modifications of the PMA-ILWU 1958 collective bargaining agreement as to wages, length of the work day, new equipment, vacations and other traditional labor-management issues. The Memorandum also reflected an agreement to study further the mechanization issue with the aim of achieving the specified goals of the bargaining parties. PMA sought to introduce labor-saving devices to increase waterfront productivity; ILWU demanded that its members share in the resultant savings, that there be no acceleration of pro-

ductivity demanded of individual workers and that there be no unsafe conditions created as a result of the labor-saving devices.

PMA demonstrated its earnestness by depositing $1.5 million into a fund for the benefit of the work force. The memorandum did not specify how PMA was to raise the money. (R. 618, 668, 244-47).

On October 18, 1960, the parties signed a "Memorandum of Agreement on Mechanization and Modernization." (Ex. 1-B; R. 262). This second memorandum established a "mechanization and modernization fund" to which PMA would contribute $29 million over a period of time ending July 1, 1966. The parties further agreed to extend the entire labor agreement until that date. By the terms of the memorandum, the $29 million was to be funded at the rate of $5 million each year with credit given for the $1.5 million already collected by PMA pursuant to the August 1959 agreement. The method of accumulating the fund was discussed with the union (R. 206-10), but since the mechanization fund plan contemplated that the members of PMA commit themselves individually and severally to payment of the fund, ILWU agreed that PMA could determine the method of collection from the members. (R. 619, 668, 207).

The President of PMA appointed a six-man Committee on Work Improvement Fund in November 1960 to recommend a method for dividing the costs of the fund. The Committee's majority report (Ex. 5-A, R. 466) was adopted by the Board of Directors and the PMA membership on January 10, 1961. (Ex.

2-O; R. 372). Payments to the fund began immediately although the final form of the agreement was not settled until November 1961 when PMA and ILWU executed a Supplement Agreement effective January 1, 1961. (Ex. 1-C; R. 279).

The method of assessment recommended by the majority of the Work Improvement Fund Committee was based on a cargo tonnage basis.[1] The tonnage formula was chosen over alternatives discussed in the Committee report. (Ex. 5-A; R. 466). One alternative would have made man-hours expended the basis for assessment rather than cargo tonnage handled. The majority rejected the man-hour approach reasoning that since the overall intent of the agreement was to reduce the number of man-hours, it would be inequitable to adopt a contribution formula by which the operators who received the greatest benefits would pay a decreasing percentage of the total contributions to the fund. (R. 468, 474).

Tonnage determinations were to be made according to a traditional "formula used for the computation of a portion of PMA dues." (R. 470, 623, 668, 110). Members agreed that tonnage declarations were to be made just as in the 1959 dues assessment reports. (Ex. 2-N; R. 371, 624, 625).

The historical method of declaring automobile tonnage for cargo dues assessment was on a measurement basis. (R. 621, 670, 218, 160-61, 110-11). Prior

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[1] The ton is defined as consisting of 2,000 pounds weight, 40 cubic feet measurement or 1,000 board feet of lumber. (R. 623).

to the establishment of the mechanization fund, neither Volkswagen nor any other person protested the measurement used to report tonnage dues on automobiles. (R. 622).

"In fixing and levying that portion of the cargo dues assessed according to tonnage handled, the Board of Directors may establish different rates per ton, or other measurement unit for different classes of cargo." (R. 406). As finally implemented the formula simply called for the payment of 27½¢ per ton on general cargo handled and 5½¢ per ton of bulk cargo. Members were to pay PMA who was to act as collecting agent of the fund. Non-member employers whose employees belonged to the ILWU also contributed to the fund at rates comparable to those assessed against members. (R. 631-32).

A Volkswagen averages 8.7 measurement tons but only 0.9 weight tons. At 27½¢ per ton, the fund assessment on a measurement basis is $2.35 per vehicle and on a weight basis equals 25¢. (R. 626). Nevertheless, the rate charged by MTC to discharge a VW decreased after implementation of the mechanization plan (R. 627, 155, 162) because of increased productivity. (R. 633, 143-144).

3. The Refusal To Pay The Assessment

Shortly after the members agreed on the method of measuring cargo PMA sent a letter to the members noting that a number of steamship companies were persisting in reporting automobiles on a weight rather than measurement basis. The letter reminded the members that the measurement basis for automobiles

had been established by a letter in January 1958 and the method was still effective. (See R. 161). Members who had been improperly reporting automobiles on a weight basis were required to revise their past tonnage declarations and pay an assessment on the difference. (Ex. 36, R. 524).

By a January 17, 1961 letter from its agents, Volkswagen protested the measurement basis of assessing PMA members for automobiles handled. (Ex. 7, R. 481). PMA reconvened its committee on the fund which in February 1961 considered protests by Volkswagen and others as to PMA's method of assessing members. Some changes were approved by the Board of Directors, but the Committee recommended continuance of the measurement ton basis for automobiles regardless of how they were manifested. (Ex. 2-L; R. 366, 628-29, 670). On March 1, 1961, MTC informed PMA that Volkswagen was refusing to pay to MTC a sum equal to an assessment based on measurement tons. (Ex. 9, R. 486). MTC in turn refused to pay its assessment to PMA. (Exs. 13, 14; R. 695-97). No other shipper of automobiles protested the method of assessment (R. 633) although one common carrier of VW's, Wallenius Lines, refused to pay its assessments upon learning in 1963 of Volkswagen's action. (R. 632, fn. 20).

In December 1961 the fund committee considered and rejected (Ex. 2-H; R. 356) Volkswagen's proposal for an assessment on a unit basis. (Ex. 26; R. 511). Unit assessment, it was felt, would have an undesirable effect on the overall program since unit

assessment would also have to be set up for other commodities. (R. 630).

The Coast Steering Committee of PMA directed on March 27, 1967 that a letter be sent to MTC (or Volkswagen) advising them that the fund committee had again considered the assessment on automobiles and did not recommend a change. (Ex. 31, R. 517). The Coast Steering Committee also advised the Board that PMA should stay out of any litigation between MTC and Volkswagen unless the mechanization fund was in jeopardy or other industry interests were threatened. Moreover, PMA reserved the right to institute an action against MTC if the latter remained in default of its fund obligations.

4. Proceedings Below

PMA instituted suit against MTC in the United States District Court for the Northern District of California on August 14, 1962. MTC impleaded Volkswagen on September 13, 1962 and the District Court stayed the proceedings on November 29, 1962 in order to permit Volkswagen to commence a proceeding in the Commission. The following issues were to be submitted to the Commission for its determination:

> 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814 (1961), before it is lawful to take any action

thereunder, which agreement had not been so filed and approved.[2]

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. § 815 (1961).

3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. § 815 (1961).

On January 29, 1963, petitioner filed its complaint with the Commission. Hearings were held before Hearing Examiner Benjamin A. Theeman, and on June 5, 1964, Examiner Theeman issued his Initial Decision. The Examiner found, *inter alia*, that MTC were persons subject to the Shipping Act, and that

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[2] Section 15 states in pertinent part: "That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume of character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

the agreement entered into between MTC and other PMA members on January 10, 1961 was a cooperative working arrangement within the literal meaning of section 15 of the Act, 46 U.S.C. § 814. (R. 644). But that agreement, he stated, consisted of only two items: (1) the report of the Work Improvement Fund Committee dated January 4, 1961, (Ex. 5-A, R. 466), and (2) the resolution of PMA's membership dated January 10, 1961, (Ex. 2-O, R. 372). (R. 636). The Examiner observed that

> "A careful reading of these documents show that they deal solely with 'the appropriate method of dividing the costs' of the Mech Fund among the PMA members. Nothing contained in the Committee report or the minutes of the January 10, 1961 meeting indicates that the Committee or the PMA membership in ratifying the majority report had gone or had intended to go beyond that specified area." (R. 637, footnote omitted).

Therefore, the Examiner concluded, the mechanization fund agreement was not the sort of cooperative working arrangement required to be filed under section 15. (R. 644).

The Examiner further found that the cooperative working arrangement between MTC and other PMA members was not one which fixed or regulated transportation rates or fares; gave or received special rates, accommodations, or other special privileges or advantages; controlled, regulated, prevented, or destroyed competition; pooled or apportioned earnings, losses, or traffic; allotted ports or restricted or otherwise regulated the number and character of sailings

between ports; or limited or regulated in any way the volume or character of freight or passenger traffic to be carried. (R. 655-56). Accordingly, the mechanization fund agreement was found to be without the filing requirements of section 15.

Additionally, the Examiner found it unnecessary to determine whether the cooperative working arrangement was part of a collective bargaining agreement or whether the arrangement violated the antitrust laws. (R. 649-51). He also found no violations of sections 16 and 17 of the Shipping Act. (R. 651-55).

After exceptions and oral argument, the Commission issued a report on October 13, 1965. (R. 666-728). The majority of the Commission affirmed the Examiner's finding that the arrangement between MTC and other members of PMA was not subject to the Shipping Act even assuming "all of the members of PMA are 'other persons' within the meaning of the Shipping Act, 1916, . . ." (R. 673). The Commission found that the agreement among the membership of PMA establishing the method of assessing for the collection of the fund "does not fall within the confines of section 15 as, standing by itself, it has no legal impact upon outsiders." (R. 675). The Commission further found that an additional agreement among the membership of PMA to pass on all or part of the assessments for the fund to carriers or shippers had not been established. (R. 675).

In finding no additional agreement, the Commission stated:

> "The record is devoid of evidence showing the existence of such an additional agreement. The

record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment." (R. 675-76).

The majority of the Commission also found itself in agreement with the Examiner that there were no violations of sections 16 and 17 of the Shipping Act. (R. 676-78). Commissioner Patterson dissented from the majority report in all respects (R. 678 *et seq.*); Commissioner Hearn agreed with the majority that there were no violations of sections 16 and 17 of the Shipping Act, but he disagreed with the majority on the issue of whether there was an agreement subject to section 15. He would have required PMA to file its cooperative working arrangement with the Commission and seek approval. (R. 723 *et seq.*).

The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's order on December 22, 1966. The court found all of the Commission's conclusions supported by substantial evidence.

SUMMARY OF ARGUMENT

1. Not every agreement among persons subject to the Shipping Act, 1916 need be filed with the Federal Maritime Commission.

The legislative history supports the conclusion that the framers of this Act did not intend that all agreements entered into by or between persons covered by the Act be filed for approval. Sound reasoning and logic compel a delineation of the area within which agreements must be filed.

2. There was a rational basis for the Commission to conclude that the agreement herein involved was not that type of agreement which falls within section 15 of the Act. There was no showing of a direct competitive impact upon shippers. To extend antitrust immunity to combinations *or* agreements not directly affecting ocean transportation would derogate antitrust laws.

3. After adequate and careful consideration of the evidence before it the Commission concluded that there was no adequate showing of unreasonable prejudice or an unreasonable practice in violation of sections 16 and 17.

ARGUMENT

I. Legislative History and Antitrust Exemption Policy

The framers of the Shipping Act, 1916, did not intend that every agreement among persons subject to the Act, was to be filed with the Commission under section 15 of the Act.

The petitioner has grossly misconstrued the intent and purpose of the Shipping Act, 1916. The passage of that Act was intended to bring under scrutiny by a regulatory agency the anti-competitive activities of ocean carriers and other parties subject to the Act,

and to grant exemption for certain activities from the antitrust laws when certain standards are fulfilled. Nowhere in the legislative history is there any indication that all agreements entered into by parties subject to the Shipping Act, 1916, must be filed with the Federal Maritime Commission; nor can it be argued that all categories of agreements entered into by and between parties covered by the Act are, or indeed should be, entitled to exemption from antitrust laws. All activity of the maritime industry has not been placed beyond the reach of antitrust laws as a result of enactment of the Shipping Act, 1916. The oft cited *Alexander Report*,[3] which presaged the Act, dealt extensively with rate and cargo pooling arrangements. In its recommendations the Committee stated as follows: "While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action." H.R. Doc. No. 805, 63d Cong., 2d Sess. p. 417 (1914). These remarks were made in connection with discussion of arbitrariness in settlement of just claims, fighting ships, deferred rebates and threats to refuse shipping accommodations. Accordingly, the Committee was clearly most concerned with the steamship

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[3] *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. 805, 63 Cong., 2d Sess., p. 415 (1914).

agreements and conferences. The concern with related and remote activities, and the limited extent of such concern is clearly established by the remarks of Representative Alexander which immediately follow those remarks quoted by petitioner in its brief, citing 53 Congressional Record 8276 (1916). Representative Alexander stated as follows: "And mind you, when you read the provisions of this bill, it only provides that there shall not be unjust discrimination *between shippers.*" (Emphasis supplied.) This was in connection with the discussion of supervision of incidental facilities connected with the main carriers. The Commission, in its administrative discretion, found no showing of unjust discrimination between shippers.

The *Alexander Report* primarily addressed itself to those "written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of non-conference lines." H.R. Doc. No. 805, 63d Cong., 2d Sess., p. 417 (1914). The agreement among the members of PMA allocating assessment for the mechanization fund is not the type of agreement, arrangement or understanding with which the Alexander Committee was concerned and sought to regulate or prohibit.

This court has repeatedly stated that it strongly disfavors repeals of antitrust laws by implication from a regulatory statute and that such have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).

The United States suggests that every agreement involving any aspect of the maritime industry should be submitted to the Federal Maritime Commission for approval if it involves a Sherman Act issue. (Brief for United States, p. 24). Such an argument poses a new and novel legal concept. To extend this argument to other regulated industries would completely derogate and emasculate the antitrust laws.

Where then is the line to be drawn? The legislative history indicates that a line is to be drawn. Common sense dictates that a line must be drawn. Administrative efficiency and equity require that a line be drawn. This Court desires that a line be drawn.

The agreement to implement the mechanization fund is essentially a cost pooling arrangement. Nowhere in section 15 is a cost pooling agreement expressly required to be filed although agreements to pool earnings, losses and traffic are specifically enumerated. The brief for the United States, at page 24, states that it is plain that an agreement among competitors allocating a shared cost is normally subject to the Sherman Act. If all cost pooling agreements are to be filed with the Federal Maritime Commission as collective actions subject to scrutiny by

the Commission, what chaos could result! The Commission could be flooded with requests for approval of trivial cost sharing agreements. The Commission in its opinion pointed out that secretarial pooling or office space sharing should not be subject to scrutiny by the Commission. (R. 674). Similarly, the Commission has in the past indicated that joint advertising of services would not constitute a cooperative working arrangement. *Maatschappij Zeetransport N.V. (Oranji Line), et al.* v. *Anchor Line Ltd.*, 6 FMB 199 (1961). See also *Los Angeles By-products Co.* v. *Barber Steamship Lines, Inc.*, 2 U.S.M.C. 106, 108 (1939). This is not to say that the Commission has been or would be loathe to find agreements subject to the Act when the facts of a given situation put them squarely within the intent of section 15. The Commission, however, has realized that limitations are inherent in a sensible reading of the statute. On the other hand, if all agreements which provide for the sharing of costs among persons subject to the Act are subject to section 15 approval, some obviously anti-competitive practices might receive antitrust immunity. For example, carriers in a conference might agree to jointly purchase certain goods or services from a manufacturer who is not a shipper (or other person subject to the Act) and is not in a competitive position with shippers. Since there would be no discrimination among shippers and no competitive advantage to the conference when the conference is free from non-conference competition, that joint purchase agreement might possibly be approved by the Commission pursuant to section 15. Yet the carriers and their sole

supplier will have been participating in a grossly competitive action which will have been immunized from antitrust prosecution. It is inconceivable that such should be sanctioned.

II. The Commission Properly Concluded That The Agreement Does Not Fall Within Section 15 And The Commission's Interpretation Of Its Statutes Should Be Upheld

The Hearing Examiner and the Commission, in ascertaining whether an agreement existed which was required to be filed by the Shipping Act, 1916, analyzed the only understanding which can be involved and at issue here, namely, the agreement allocating the mechanization fund assessment among PMA members. From evidence presented the Commission found that the agreement for assessment, standing alone, had no competitive impact upon outsiders. (R. 675). That assessment, standing alone, did not involve shippers and, in fact, involved nothing more than a reasonable basis for the joint sharing of costs arrived at by some reasonable determination. (R. 677). That assessment, standing alone, did not involve any charges by PMA to customers or clients of PMA's membership. (R. 638). One member of PMA in fact who was handling Volkswagens paid the assessment until it learned that MTC was not paying the assessment. (R. 632, footnote). MTC's individual decision to pass the cost on to Volkswagen is the specific act which led to and gave rise to this litigation, not the assessment among PMA's membership. This allocation is very similar to trade association

dues discussed in *Kennedy* v. *Long Island R.R. Co.*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963). In fact, for years PMA assessed its dues on the very basis, without any objections, to which petitioner now, some years later, takes exception. (R. 677). The assessment of dues on a measurement ton basis, as well as assessment of the cost of the mech fund on a measurement ton basis, follows the custom of the industry.[4]

The non-applicability of section 15 to the agreement may be established on bases other than that the mech-fund agreement may have been related to labor-management problems. Although the Commission looked to a decision involving labor-management relations, its primary concern was the basic issue of whether there was a competitive relationship *Kennedy* v. *Long Island R.R. Co.*, *supra*, 319 F.2d

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[4] Cufley, *Ocean Freights and Chartering*, 279 (1962), states as follows:

> "For the purposes of liner working the measurement ton is not reckoned on the stowage factor of the goods, i.e. their real volume per ton weight. It is calculated on the actual space occupied in the holds or other cargo compartments. This serves to compensate the shipping company for BROKEN STOWAGE, which is the space lost between one package and another and not allowed for in stowage factors relating to other than bulk goods. Thus when automobiles are carried, their overall maximum measurements are taken. Height, breadth and length are then 'cubed-up' and freight is payable on the block of space bounding the extremities of the vehicle. In practice the shipowner, exercising his option to charge per ton W/M, will receive freight on from 10 to 20 tons 'measurement', although the motorcars weigh only from 1 to 2 tons each." (emphasis supplied)

366 (2d Cir. 1963). *Kennedy* involved an interpretation of section 5(1) of the Interstate Commerce Act, 49 U.S.C. § 5(1). That section predated section 15 of the Shipping Act and like section 15 authorizes the filing of pooling agreements for agency approval. The Long Island Railroad sought to ameliorate the effect of union whipsawing by subscribing to an insurance program which supplied a limited amount of funds to roads hit by a certain limited class of strikes. Appellant contended that the plan was a pooling agreement which violated section 5(1) of the Interstate Commerce Act because it had not been approved by the Interstate Commerce Commission. The court said:

> "* * * We believe this section to be an expression of transportation policy solely and not of labor policy. Thus, at the time the act was passed, 'pooling' was defined as
>
> > simply an understanding or agreement among the roads that each shall take a certain proportion of the business of the territory they compete for, and in the event of their not being able to divide the business physically, they equalize the disadvantages by dividing profits.
>
> See S.Rep. No. 46, 49th Cong., 1st Sess., Appendix p. 153 (1886). It may be true that the collection of premiums and payment of proceeds to a struck railroad might be viewed literally as 'the division * * * of gross or net earnings,' since contributions to the insurance fund were from the passenger and freight revenues of the participating roads. But so too are their *contri-*

> *butions to the A.A.R., a trade association whose expenses are met by assessments from its members* in proportion to their operating revenues; but we do not understand the appellants to contend that the mere existence of the A.A.R., or of any other trade association in the transportation field, runs afoul of the anti-pooling provision of the Interstate Commerce Act and also, incidentally, of the Sherman Act. Similarly here, the strike insurance plan does not represent an attempt to apportion business among *competing* railroads on a basis other than individual performance. Its validity under the Interstate Commerce Act § 5(1) can thus hardly be doubted." 319 F.2d at 374. (Emphasis supplied, footnotes omitted.)

In the instant case, the Commission found that the mechanization fund agreement did not affect the competitive relationships among the PMA members, as there was no agreement among the members to pass on all or a part of the fund assessments. The decision of whether to absorb or pass on the assessments was left to each individual member, and there was no evidence of any concerted action taken to determine how the members were to meet the assessment. The Commission explicitly found that there was a divergence of action among the members as to whether the assessments would be absorbed or passed on. (R. 676).

Petitioner cannot seek refuge in the cases cited in which the Civil Aeronautics Board has examined agreements affecting labor-management relations. Every agreement "affecting air transportation" must

be filed with the Civil Aeronautics Board, 49 U.S.C. § 1382, and obviously labor management agreements in the aviation industry affect air transportation. On the other hand, neither the Shipping Act nor the Interstate Commerce Act contain such sweeping language, but rather spell out the agreements which must be filed.

The interpretation of these statutes, as determined by the Commission, must be upheld. Upon the evidence presented to it the Commission found no agreement which had a direct competitive effect upon shippers. This finding, approved by the court of appeals, according to statements of this Court, must be upheld. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966). The legislative history is clear that an agreement of the type found to exist here by the Commission is not, as a matter of law, an agreement which must be filed pursuant to section 15 of the Shipping Act, 1916.

In addition to such legal basis for the Commission and court's conclusion, there is further a rational basis for that conclusion. The Commission's interpretation in these circumstances was a reasonable one, and even though it may not have been the only reasonable one that could have been reached, it should be upheld especially where, as here, it is supported by the legislative history and a similar construction of like provisions of the Interstate Commerce Act. As the U. S. Court of Appeals for the District of Columbia Circuit recently said,

> "In approaching the problem of statutory interpretation before us, we show "great deference

> to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'" *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission*, 359 F.2d 282 (D.C. Cir. 1966) (footnote omitted).

In its decision in the instant case the court of appeals stated appropriately as follows:

> "Deference must also be paid in this case to the Commission's expertise, especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.
>
> Applying these general principals to the specific issues before us in this case, and giving due deference to the expertise of the Commission, we conclude (albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commission's decision. The Commission's conclusion that the funding agreement standing alone does not come within the provisions of Section 15 is a tenable one and not arbitrary or capricious, especially in view of the paucity of dispositive precedent on the question." (R. 792).

The Commission was not capricious in its analysis of this matter. It is clear from the entire record that considerable study was given to the issue herein involved. In fact not only did the Commission find that this agreement under analysis was not one which

would be required to be filed pursuant to section 15 but it also went on to say what type of agreement would be required to be filed, namely, an agreement to pass on the cost directly to the shippers. The Commission after reviewing the evidence presented, found no agreement to pass the cost on to the shippers by PMA members. In fact some of the members did not pass the automobile assessment cost on. Accordingly, the Commission's findings in this matter should not be disturbed.

The Hearing Examiner in finding that section 15 did not require the filing of cooperative working arrangements that did not burden ocean transportation, not only looked to the legislative history but also applied the rule of *ejusdem generis*. As the Examiner stated, "Under this rule the Commission would be required to construe the language: 'in any manner providing for an exclusive, preferential, or cooperative working arrangement' coming as it does at the end of a list of practices and arrangements as limited to the practices and arrangements of the same general class as those specifically mentioned in the previous six categories."

This court has long and often recognized the role of administrative agencies in interpreting administrative statutes. This court has said,

> "the scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern

> . . . the very breadth of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters." *Securities Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 at 207-08 (1947).

Recently in reviewing an interpretation of the Interstate Commerce Act this Court declared "judicial review of this conclusion is limited to consideration of whether it has a rational basis and is supported by substantial evidence.". *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962). In the instant case there is no departure by the Commission from earlier precedent and it is clear from the record that there was a rational basis and substantial evidence to support the Commission's interpretation.

III. There Was No Showing Of Undue Or Unreasonable Prejudice Or Disadvantage

The findings that there was not a sufficient showing of undue or unreasonable prejudice or disadvantage were well considered, properly sustained by the Court of Appeals and should not be reversed.

A. The petitioners have conceded that section 16 of the Shipping Act, 1916, was not violated.

It is difficult to see how one can argue that the Commission failed to give adequate consideration to the allegation of violation of section 16 when the petitioner in its brief stated as follows:

> "We do not claim that the measurement formula 'regardless of how manifested' subjects Volks-

wagen automobiles to 'prejudice or disadvantage' as compared to other automobiles, and we submit that there is no other cargo classification in competition with automobiles.

Under decisions of predecessor agencies of the Federal Maritime Commission in such cases, section 16 of the Shipping Act (46 U.S.C. 815), has been held inapplicable. *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij 'Nederland,'* 4 F.M.B. 343 (1953); *The Paraffine Companies, Inc.* v. *American-Hawaiian S.S. Co.*, 1 U.S.M.C. 628 (1936); *Johnson Pickett Rope Co.* v. *Dollar S.S. Lines, Inc., Ltd.*, 1 U.S.S.B. 585 (1936). The Hearing Examiner may consider himself bound by these precedents.

Our only reason for invoking section 16 at this time, accordingly, is to preserve the issue so as to be able to ask for a reconsideration of the above rulings if this case should reach the Commission itself and also to have it available for possible judicial review." (R. 652).

As stated in the Solicitor General's brief, there was no discrimination between competitors here. The mechanization fund assessment fees did not distinguish between different makes of automobiles. The Solicitor General's brief went on to point out that the Commission's view has been supported by interpretation that has been placed on section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1). Brief for the U.S., p. 35. The petitioner, however, seeks to rely on the decision in the case of *New York Foreign Freight Forwarders and Brokers Association* v. *FMC*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S.

914 (1965). There, the court reviewed six rules promulgated by the Commission affecting the ocean freight forwarding industry. One rule required a licensed freight forwarder to itemize in his billing the actual expenditures made on the shipper's behalf as well as the fees assessed for his own services. The court agreed that there was no discrimination in the sense that some shippers are billed differently from other shippers. Nevertheless, the court held that "we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique" of the rule. 337 F.2d at 300. It was the prophylactic purpose which the court felt justified the rule, not the competitive relationships which might be affected.

The petitioner also relies on *Investigation of Free Time Practices, Port of San Diego*, 9 F.M.C. 525 (1966). The Commission examined the free time and free storage practices for cargo on the piers and found the practices bear no relationship to the character of the cargo service, saying "it is extended to cargo on equal terms without regard to size, shape or any other characteristic inherent in the particular cargo involved. The equality required in situations *of this kind* is absent and is not conditioned on such things as competition, proximate cause and the like." *Id.* at 547. (Emphasis supplied). It is clear that the Commission views the situation in the instant case and the situation in the San Diego case as different on their facts. The Commission was careful in the San Diego case to restrict its discussion of a possible violation of section 16 to the facts of that case only.

The Commission stated "to the extent that the other cases may read as requiring the establishment of a competitive relationship *in the situation here involved* they are overruled." (Emphasis supplied). Accordingly, the diminution, if any, of the competitive relationship principle as a result of the above two cases is limited only to those situations in which there are services that are not dependent upon the nature of the cargo and varying charges therefor. It is clear that in the instant case there are different charges depending upon the nature of the cargo involved. The above cited cases relied upon by petitioner are not applicable. Storage space was the commodity involved in the San Diego case and space is space. However, unloading of potatoes, lumber and automobiles is not the same. The Commission's finding that the practices herein involved were neither unjust nor unreasonable was arrived upon after full consideration of the case.

B. The Commission in examining the evidence submitted to it did not find a basis for holding that the practice here involved was unjust or unreasonable in violation of section 17.

It is not the role of the Commission to establish that a practice was just and reasonable in order to determine that it was not unjust and unreasonable. Nevertheless, the Commission did examine every facet of the argument presented to it and arrived at a finding which is sustainable as being reasonable. The Commission recognized that there was a variance in assessment for automobiles and other cargo items.

The Commission pointed out in its opinion that there is, however, no statutory requirements that all users of a facility be assessed equally. It cannot be argued that different charges for carriage or handling of different commodities is illegal *per se*. In fact the Commission has recognized that different commodities may well be charged different rates. *Aleutian Marine Transport Co., Inc.—Rates From, To and Between Seattle, Washington and Ports in Alaska*, 7 F.M.C. 592 (1963). *Pacific Coast Hawaiian and Atlantic Gulf Hawaiian General Increases in Rates*, 7 F.M.C. 260 (1962). The Commission will not normally declare a charge unlawful as long as substantial benefits are provided for one against whom a charge is levied. *Evans Cooperage Co., Inc.* v. *Board of Commissioners*, 6 F.M.C. 415 (1961). It should be pointed out here the fact is that there is no levy against the shipper but only against the terminal operator who clearly received substantial benefits. The shipper, in turn, has, of course, received substantial benefits. The Commission went on, however, to point out that there would be an exception to the foregoing principle if "the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than any other." (R. 677). The Commission found no deliberate design after reviewing the evidence presented to it. Rather, it found that there was a sound business basis for the assessment as derived by PMA. The basis of the assessment was derived through the business judgment of PMA. The Association had collected dues

for many years, without objection, on the same basis as the mech fund assessment was determined. The Commission did not determine availability of sufficient evidence to establish to its satisfaction that the practice herein involved was unreasonable. In fact, nowhere in the record has petitioner shown what the cost is for unloading a vehicle. Thus, it cannot be argued that the Commission did not fully examine this issue or the evidence presented to it. Accordingly, the Federal Maritime Commission arrived at a conclusion, based on the facts presented to it, that there was no unjust or unreasonable practice.

C. The Commission's findings concerning alleged violations of sections 16 and 17 were based upon the Commission's expertise.

These findings must be accorded finality. This was recognized by the court below. The court of appeals, in upholding the Commission's finding concerning alleged violations of sections 16 and 17, relied upon a recent decision of this court in *Consolo* v. *FMC*, 383 U.S. 607 (1966) wherein this court stated:

> "Section 10(e) of the Administrative Procedure Act . . . gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . .' *Cf. United States* v. *Interstate Commerce Commission*, 91 U.S. App. D.C. 178, 183-184, 198 F.2d 958, 963-964, cert. denied, 344 U.S. 893. We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.

Congress was very deliberative in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence; it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of a statute." 383 U.S. at 619-20 (footnote omitted).

Such a position is particularly relevant in this case because of the technical and specialized nature of the subject involved.

CONCLUSION

The judgment of the court below giving proper deference to the role of an agency in interpreting statutes administered by it and evaluating evidence submitted to it should be affirmed.

Respectfully submitted,

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November 1967.

APPENDIX

The pertinent provisions of the Shipping Act 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are as follows:

Section 15:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commistsion a true copy, or if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.
>
> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from

the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modification, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry

out in whole or in part, directly or indirectly, any such agreement, modifications, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however*, That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were enter into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after

the enactment of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Section 16:

* * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * *

Section 17:

* * * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATON,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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No. 69

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief for Pacific Maritime Association, Intervenor

QUESTIONS PRESENTED

The Section 15 Question.

Where most of the members of a maritime collective bargaining association of employers are parties subject to the Shipping Act; and where the association, under a collective bargaining agreement, makes a specific cash commitment to the union in exchange for a promise of more pro-

ductive labor performance; and where the members of the association develop an assessment formula to fund the cash commitment; and where there is no undertaking or understanding of any member of the association to establish rates which either pass on or absorb the assessment; and where there is no undertaking or understanding of any member to establish rates which either pass on or retain the benefits of increased productivity—does such collective conduct result in the type or character of arrangement which must be submitted to the Federal Maritime Commission for approval under Section 15 of the Shipping Act as a condition precedent to its validity?

The Sections 16 and 17 Question.

Is there evidentiary support for the findings below that the formula devised by the Pacific Maritime Association for funding its obligation under the Mechanization Agreement was *not* a special formula for computation of the mechanization assessment on the handling of automobiles and *did not* cause undue or unreasonable prejudice or disadvantage to Volkswagen in violation of Section 16 or result in an unjust or unreasonable practice in violation of Section 17?

STATEMENT OF THE CASE

1. The Parties.

Pacific Maritime Association (PMA), intervenor, is an association whose members are water carriers, marine terminal operators, and stevedore contractors. These members comprise the Pacific Coast shipping industry. PMA is one of the largest employer collective bargaining associations. It maintains offices at major Pacific Coast ports. It administers and implements contracts negotiated with eight unions, of which the International Longshoremen's and

Warehousemen's Union (ILWU) is one.[1] It maintains central pay offices and cooperates in the operation of maritime hiring halls. PMA agreements with maritime unions provide for annual payrolls of several hundred millions of dollars. Its staff administers fringe-benefit programs that have accumulated trust funds in excess of a hundred million dollars. (R. 612a; 616a; 667a; 179a-183a.) It is *not* a rate-making body or conference. (R. 617a; 179a.)

Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (MTC), referred to in the Examiner's and Commission's decisions as "respondents", are stevedore contractors serving both common carriers and private carriers. They have performed services for Volkswagen since 1954. They are members of PMA. (R. 614a; 615a; 667a.)

Petitioner, the manufacturer of Volkswagen automobiles, imports vehicles through West Coast ports. (R. 669a.)

2. The Volkswagen Shipments.

Approximately 75% of Volkswagen's vehicles move on chartered vessels and the remainder on common carriers. (R. 614a; 669a.)

The stevedores (employers of longshoremen) who discharge Volkswagen's vehicles from vessels of common carriers are employed and paid by the steamship lines. The charges for these stevedore services are not billed separately but are covered by the steamship's freight rates. (R. 629a; 632a; 177a.) Steamship freight rates on automobiles did

1. ILWU is the certified collective bargaining agent of all longshoremen and marine clerks employed on the Pacific Coast. (R. 181a.) Contrary to the statement in the Solicitor General's brief (p. 4), ILWU does not bargain on behalf of seagoing, "offshore," personnel. (R. 98a.) This personnel is represented by seven other unions.

not increase during the period of time relevant to this case. (R. 632a-633a; 177a.)

The stevedores who discharge Volkswagens from vessels chartered to Volkswagen under its FIO ("free-in-and-out") charters are employed and paid by Volkswagen under private contracts. These are the only stevedoring charges which Volkswagen pays directly. The contracts negotiated by Volkswagen with MTC provide for a commodity rate that includes the cost of labor, taxes, insurance, overhead and profit. (R. 621a; 154a; 160a; 764-765.) This commodity rate is negotiated annually on an analysis of costs incurred since the previous review; it is, in effect, a cost-plus rate. (R. 621a; 155a; 764-765.) Upon renegotiation of the commodity rate charged to Volkswagen after inauguration of the plan, the rate to Volkswagen per vehicle for MTC stevedore services was less than the charge made prior to 1961. (R. 627a.)[2]

This litigation developed from the refusal of Volkswagen to pay the stevedore charges as submitted by MTC. Volkswagen insisted that it was entitled to deduct an amount equal to the labor cost incurred by MTC under the ILWU-PMA Mechanization Plan. (R. 627a.) Volkswagen asserts that this labor cost was unfair, arbitrary and unlawful under the Shipping Act.[3]

3. Establishment of the Mechanization Plan and Its Implementation.

In the Fall of 1960, PMA and ILWU agreed to a program to foster modern and efficient cargo handling. ILWU had saddled the longshore industry with baroque work

2. This statement deliberately contradicts the brief of the Solicitor General. The discrepancy is discussed herein at pp. 15-20, *infra*.

3. In the District Court, Volkswagen also asserts violations of the Sherman Act, which charges, on Volkswagen's request, have been stayed pending determination of the Shipping Act questions.

practices designed in the thirties to make work for unemployed dockworkers but vigilantly elaborated upon for over a generation. Exorbitant labor costs were the result. Efforts to reduce these costs by the introduction of modern vessels and improved cargo gear were blocked by ILWU. Any deviation from the status quo in gang structure and work practices stimulated "hard-timing," slowdowns and strikes. (R. 618a; 668a; 183a-187a; 213a-214a.)

After extended and intensive collective bargaining negotiations commencing in 1957, an Agreement on modernization was reached in 1960. (R. 618a; 668a.) The objective of the employers was to obtain the uncontested right to introduce labor-saving machinery and modern vessels; to determine the number of men who would work on a particular job; to introduce other time-saving procedures; and, generally, to have a free hand in directing loading and unloading operations. (R. *Ibid.;* 203a-205a.) The objective of ILWU was to protect dockworkers who would be replaced by more efficient methods. (R. 618a; 668a.)

The employers accepted the ILWU promise that labor costs would be reduced by increased productivity per man. ILWU accepted the employers' promise to add to labor costs twenty-nine million dollars for the privilege of inaugurating a new approach to operations. (R. 618a-619a; 668a.)

The philosophy underlying this agreement was unique. It marks a signal achievement of the collective bargaining process. It marked a new era in Pacific Coast labor-management relations on the waterfront. At long last the old trend was reversed. For the first time both sides could leave the negotiating table with sound reason to believe that a mutually beneficial agreement had been achieved. (R. 219a-222a; 229a.)

Implementation of the initial ILWU-PMA Memorandum of Understanding was commenced in January 1961, and the formal Agreement was executed in November of that year after novel and troublesome tax problems had been solved. (R. 619a; 221a; 229a.) The Agreement provided that PMA reserved the right to develop the method of collecting contributions for the mechanization fund from those PMA members who are direct employers of dockworkers. (R. 620a; 668a; 284a.)[4] Therefore, PMA appointed a Committee to develop recommendations for allocation of the cost of the plan among such members. (R. 619a; 216a.)

Numerous methods for allocation were proposed and considered. It was soon realized that it was statistically impossible to allocate this new cost in direct proportion to the benefits to be obtained. (R. 467a.)[5] Bereft of precise statistical guidance, the Committee turned to conceptual solutions.[6] The remaining alternatives were assessments based on man-hours or tonnage, or combinations of both. (R. 466a-479a.) The man-hour assessment was rejected

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4. At pp. 21-22, *infra*, we demonstrate that this reservation of power does not prevent the funding arrangements from being an integral part of the collectively-bargained mechanization plan.

5. The Committee could not devise a formula that related contributions to savings only because to do so would have been cumbersome and difficult, if not impossible, to administer. The Committee did *not*, as Volkswagen implies at pp. 5-6 of its brief, oppose such a formula on principle.

6. PMA records did not enable its committees to pick out specific cargoes or stevedore operations that were most likely to benefit from the plan. (R. 234a-235a.) The Committee did not, prior to the issuance of its report, make any study of the extent to which stevedores handling automobiles could effect savings as compared with the costs of the plan (i.e., the productivity approach, which the Committee rejected as unworkable in practice). Nor did the Committee examine in detail the costs or savings attributable to the mechanization plan as it applied to any of the other 600-odd commodity operations affected. (R. 95a; 112a-113a; 466a-474a.) The Committee did not specifically discuss automobiles prior to the issuance of its report. (R. 102a; 111a.)

because, contrary to the objective of the plan, an employer would contribute less as his savings due to the plan increased. (R. 468a-474a.) Accordingly, some type of tonnage assessment was indicated.

For many years prior to adoption of the plan, dues assessed to PMA members to defray the substantial cost of operating the association were computed on the basis of tonnage handled. (R. 623a; 668a; 470a.) To assure that all members computed their tonnage dues on the same basis, PMA historically determined tonnage in the same manner as its carrier members determined their revenue. (R. *Ibid.*; 81a; 103a.) The revenue ton is computed on the basis of the cargo's weight (2000 lbs/ton) or measurement (40 cu. feet/ton), whichever is greater.[7]

As a consequence of this well-established system for the collection of PMA tonnage dues, the same system was adopted as a fair and efficient means of allocating the mechanization costs.[8] (R. *Ibid.*) Therefore, the members were directed to report and make their contributions to the plan in the same manner as the tonnage declarations were

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7. *Chartering and Shipping Terms*, 3d ed. 1951, pp. 105-106; *Modern Ship Stowage*, U.S. Dept. Commerce, 1942, pp. 141-142. The tonnage of lumber is based on board feet. Tonnage dues on bulk cargo are computed at one-fifth the rate for computation of dues on general cargo. This ratio was also adopted for the mechanization assessment. (R. 470a.)

8. Although a tonnage assessment was initially adopted, the plan was ultimately financed by a combination of tonnage and man-hour assessments: Approximately 12% of the fund is collected on a man-hour basis from employers of marine clerks to cover benefits paid under the plan to their employees whose work is not tied to tonnage handled; 88% is collected from employers of longshoremen on the basis of tonnage handled by them in order to cover the cost to benefits of their employees whose work is tied to tonnage. Volkswagen does not protest the inclusion in the MTC commodity rate of the man-hour labor cost which MTC incurs as an employer of marine clerks. (R. 631a; 669a.) Volkswagen only challenges the tonnage assessments incurred by MTC as a stevedore contractor.

reported for "dues" in 1959, which was selected as the base year prior to imposition of any mechanization assessment. (R. 624a.)

Historically, PMA tonnage dues on the handling of automobiles have been and still are computed and paid on the basis of measurement. (R. 622a n.12; 670a; 80a-81a; 83a; 217a-218a.) In particular, MTC, with the knowledge of Volkswagen, reported and paid on a measurement basis the MTC tonnage dues imposed on its handling of Volkswagen's vehicles; Volkswagen did not protest this method of computing MTC tonnage dues, notwithstanding that Volkswagen knew they were an item within the MTC cost-mix. (R. 621a-622a; 160a-161a; 762; 764-765.)

Thus, the funding formula simply followed well-established past practices. The revenue ton on the carriage of automobiles in the offshore trades (the only movement of automobiles of any consequence) had always been calculated by measurement tons and not by weight tons. (R. 670a; 621a n.11; 218a; 753-754.)

Thus, notwithstanding the misstatements in the Solicitor General's brief (pp. 37, 41), there is no conflict with past practice and no new formula has been evolved. On the contrary, Volkswagen's efforts to obtain a modification of the funding formula by substituting weight tons for measurement tons was itself a proposed departure.

The foregoing description of the manner in which the funding formula was developed emphasizes the fact that PMA members were concerned solely with implementation of the mechanization agreement and were not rate-making. (R. 675a.) In the words of the Examiner: "There is no substantial evidence to show that the actions of either the PMA membership or the Board of Directors or the Committee after January 10, 1961, were intended to do more

than establish a method of assessment of the membership for contributions to the Mech Fund." (R. 637a.)

4. Volkswagen Stevedore Bills.

Prior to implementation of the mechanization plan in January 1961, MTC charged Volkswagen $10.45 per vehicle for its cargo-handling services; its overhead and profit margin was approximately $1.00. (R. 140a-146a.) There is no evidence—hence no finding—as to the specific dollar figure charged petitioner by MTC for stevedoring at any time following implementation of the mechanization plan.[9]

We stress, however, that while the specific cost was not disclosed, the Examiner found:

> "For a while, the charge continued at the old rate. Some time later, a lesser rate was negotiated." (R. 627a.)
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> "*. . . there is no substantial evidence to support Volkswagen's conclusions that PMA imposed 'a non-absorbable charge on this cargo.'*" (R. 637a n.24; emphasis added.)

The testimony of the Vice President of MTC, which was adopted by Volkswagen's Pacific Coast representative, confirms that items of post-plan costs decreased. (R. 143a; 155a; 162a; 767.) MTC had been able to "increase the rate of production of their gang hour." (R. 633a; 143a; 767.)

Matson Navigation Company succeeded in decreasing the costs of handling automobiles from $12.00 to $4.00 per automobile (R. 224a), and Volkswagen's Pacific Coast repre-

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9. Volkswagen at all times knew what it was charged to unload its vehicles. Volkswagen did reveal its pre-plan charges. It never revealed its post-plan charges, although it knew its own as well as MTC's costs. (R. 167a-169a.)

sentative acknowledged that Volkswagen's production per gang hour was "comparable" to Matson's. (R. 171a.)

Substantial savings by reduction of gang size and "dead-time" were achieved. The contribution of these savings to increased productivity were—the Vice President of MTC conceded—attributed to the improved attitude of dock-workers produced by the plan. (R. 157a-159a; 162a; *cf.* 225a-226a.) The interplay of all these factors accounts for the ability of MTC to decrease its commodity rate, while at the same time, a new item of labor cost was assumed. (R. 219a.)

5. The Suit Against MTC and Reference to the Commission.

Following circulation of the Committee's recommendations, Volkswagen induced its stevedore contractors to solicit PMA to compute the mechanization assessment on the handling of automobiles at one-tenth the rate at which PMA dues were then, and are now, computed: Volkswagen urged substitution of a weight ton for the measurement ton in use for years. (R. 628a-629a, n.19; 654a; 218a; 760-761.) The fact that petitioner's automobiles were carried on chartered vessels under lump sum daily charter hire, and were not freighted on any tonnage or unit basis, was offered as excuse for a deviation in favor of Volkswagen. (R. 629a; 511a.)[10] Despite the fact that operational experience under

10. Volkswagen also represented to PMA that freight on automobiles in offshore trades is determined by unit and that tonnage dues in respect to handling of automobiles are paid variously by unit, weight and measurement. (R. 218a; 511a.) These representations are contrary to fact but have been repeated by petitioner without noting that the findings establish (1) Volkswagen knew MTC tonnage dues on the handling of its vehicles were computed and paid on a measurement basis (R. 621a; 160a-161a); (2) freights are "dependent upon measurement" in the offshore trades regardless of how tariffs are quoted. (R. 621a; 670a.)

the plan had not yet been had, Volkswagen induced its stevedore contractors to seek a modification of the assessment formula that would inure only to Volkswagen's benefit and had no historical basis. (R. 761; 654a; 626a-627a.) PMA denied Volkswagen's requests for a deviation (R. 629a-630a.) PMA was unpersuaded that Volkswagen suffered any hardship,[11] and concluded that Volkswagen's proposal would lead to interminable bickering with employers of dockworkers regarding the impact of the plan upon the handling of hundreds of commodities which cross Pacific Coast docks. (R. 630a.)

A dangerous situation jeopardizing the tax position of all contributing employers was developing because of the MTC refusal to contribute. (R. 518a.) Hence, PMA firmly demanded that all delinquent contributions be paid. MTC thereupon requested cooperation from PMA in a suit against Volkswagen. PMA agreed to assist, but when a conflict of interest between PMA and MTC threatened, PMA withdrew its undertaking to assist. (R. 517a-518a.)[12]

Finally, when its demands did not produce results, PMA sued MTC in the Federal District Court. MTC answered by impleading Volkswagen, who interposed claims of illegality

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11. The Trial Examiner agreed: "Volkswagen's contention that the Mech Fund charge puts VW at a competitive disadvantage in relation to other compact cars is given little weight considering the relationship between the Mech Fund charge of about $2.35 to the selling price of VWs." (R. 654a n.49.)

12. This withdrawal of assistance has been challenged as being a mere cover for a friendly suit. It is asserted that PMA's willingness to assist MTC proves that PMA intended to assess Volkswagen rather than MTC. This view of the evidence has not prevailed below because the facts are just the reverse. PMA at all times has recognized its right and duty to defend its funding formula, but it has consistently taken the position that the obligation of members to contribute to the fund is separate and distinct from any rates or charges which its members may see fit to quote. (R. 219a-220a; 227a-228a.)

under the Shipping Act, 1916, and the Sherman Act. On Volkswagen's request, all court proceedings were stayed pending final determination of the Shipping Act questions by the Commission.

With respect to the issues presented under Section 15 of the Shipping Act, 1916, the Commission held that *if* PMA members had engaged in rate making by requiring the addition of the mechanization assessments to established rates, such an agreement would be within the Act. However, the Commission found that the Record was devoid of any evidence of such an agreement. The Commission, therefore, concluded that the mechanization plan and its assessment formula are not covered by the Act, since they were solely agreements affecting labor-management relations. (R. 675a.)

With respect to whether a violation of Section 16 had occurred, the Commission held that Volkswagen had admitted "that all of the relevant case law requires a showing that competitive cargo has been preferred," and that Volkswagen's cargo had not been "subjected to 'prejudice or disadvantage'" as compared to competitive cargoes; hence, petitioner had failed to establish a Section 16 violation. (R. 676a.)

With respect to the Section 17 issues, the Commission concluded on the basis of established principles,[13] that there is no statutory requirement that the various users of a maritime facility be charged identically "as long as 'substantial benefits' are provided" for the charges assessed. (R. 677a.) The Commission found: Volkswagen secured substantial benefits from the mechanization agreement; the method adopted by PMA for the funding of the mechanization agreement was indicated by sound business judgment and was reasonable, being modeled after the methods for

13. *See, e.g., Evans Cooperage Co. v. Board of Comm'rs*, 6 F.M.B. 415 (1961).

collection of association dues that had been in use for many years without protest. (*Ibid.*)

The Court of Appeals in a careful and detailed opinion (371 F. 2d 747, R. 779-801) affirmed the Commission on all points. In its decision, the Court of Appeals recognized and applied the principles of *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966).

SUMMARY OF ARGUMENT

Re Section 15.

Agreements between maritime operators which fix the rates the parties must charge to their customers are fairly characterized as rate-making agreements and as such require Section 15 approval. The characteristics of a Section 15 agreement are (1) it is entered into between maritime firms, (2) it fixes rates, or pools revenues, or controls maritime competition, or allots ports, or regulates sailings, etc., and (3) it deals exclusively with ocean transportation. When an agreement may be fairly characterized as a Section 15 type of agreement, it retains that classification even if the rates charged by the parties to the agreement are fair. When an agreement cannot be fairly characterized as a Section 15 agreement, it retains that classification and does not become converted to a Section 15 type of agreement even if the rates charged by the parties to it are unfair. The Shipping Act adequately arms the Commission under Sections 16 and 17 with the power to redress any damage done by unfair maritime rates.

Agreements which are fairly characterized as labor agreements need not be approved under Section 15. The characteristics of a labor agreement are that it provides for wages, hours, conditions of employment and deals with the numerous other issues which arise between employer

and employee. The usual result of a labor agreement is to increase the costs of the employer parties. Increased costs are reflected by increased rates or prices unless (1) the profits are reduced or (2) offsetting savings are obtained. Regardless of whether increased costs generated by labor agreements are absorbed by a reduction of profit, or are offset by savings, or are passed on to the customer, or are accounted for by some combination of these alternatives, the underlying labor agreements do not thereby change their character as such and become rate-making agreements. The Mechanization Agreement and the assessment formula which it requires and incorporates cannot be characterized as anything other than a labor agreement. In fact, it is one of the outstanding collective bargaining achievements of our day. It solves troublesome problems introduced by modernization and automation. Its pioneering principles have received national acclaim. Even our adversaries commend it.

The Shipping Act is designed to regulate ocean transportation. Labor-management problems are controlled by the NLRA and the processes of collective bargaining. To transfer the latter activities to a commission which, although well versed in shipping problems, claims no expertise in the field of labor, would produce tragic results.

If a labor agreement contains some anti-competitive vice comparable to a "cat's paw" agreement, that circumstance does not convert it into a Section 15 agreement. In truth, the fact that it is not a Section 15 agreement actually protects any injured party. Since a non-Section 15 agreement is not entitled to anti-trust immunity, a party aggrieved remains free to assert his anti-trust complaint in the federal courts.

Re the Sections 16 and 17 Issue.

The determinations of the Commission that Volkswagen was not either prejudiced or disadvantaged in violation of Section 16, or subjected to an unreasonable or unjust practice in violation of Section 17, present factual questions peculiarly within the competency of the Commission. The decision of the Court of Appeals, deferring to the Commission in accordance with the principles reiterated in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966), determined that substantial evidence supports the determinations of the Commission, and, indeed, there is no evidence that a special formula was devised for the assessment on the handling of automobiles.

ARGUMENT

I. THE SECTION 15 ISSUE.

A. The Solicitor General's Factual Misconceptions.

Certainly we do not accuse the Solicitor General of intentional misrepresentation. But with equal certainty we do accuse the Solicitor General of indulging an academic and uninformed inference which ignores and disputes the record.

Briefly stated, the Solicitor General characterizes the mechanization plan and its assessment formula as rate making because: (1) the assessment formula added an item of cost of MTC of $2.35 per automobile; (2) sellers pass costs on to buyers; (3) MTC had a profit margin of only about $1.00 per vehicle and (4) to retain its profit margin MTC had to increase its rate to Volkswagen by $2.35 per vehicle.[14]

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14. The seriousness of the misconception indulged by the Solicitor General is brought into focus by his assertions that MTC "obviously could not absorb a $2.35 mechanization assessment and was compelled to increase the charges to petitioner [Volkswagen]

Thus the Solicitor General argues that the plan and its assessment formula required MTC to add $2.35 per vehicle to its existing charges to Volkswagen and, therefore, was subject to Section 15.

But the facts are different. The fourth point enumerated above could be true only if all other items in the MTC cost mix remained as they were pre-plan. Such did not occur. The item of $2.35 which MTC added to its numerous costs was merely the price it paid to *reduce* other labor costs per unit handled. That is to say: under the plan, MTC (as well as all other PMA members), contracted for a reduction of labor costs per unit of production by eliminating the practice of paying men for doing nothing (featherbedding) and by obtaining the right to use modernized vessels and other mechanical improvements without union interference. Moreover, as these elements of labor costs went down, other items of costs which are based upon wages, such as taxes and insurance, also decreased. Therefore, instead of the inference drawn by the Solicitor General in step (4) above, the more reasonable inference is that the members of PMA added one item of labor cost in order to recoup that amount or more by reduction of other items of labor costs.

But we need not rely upon inference. The record is clear. The facts are:

(a) The $2.35 per vehicle was added to the MTC cost mix, but our adversaries did not disclose the *reductions* in the MTC cost mix. They did prove that the pre-plan rate per

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by that amount." (Emphasis added). (p. 37.) It is not difficult to jump to the erroneous conclusion that an increase in one cost to a cost-plus operation must result in an increase in price. In our brief opposing Volkswagen's petition, when preoccupied with the issues pertinent only to Certiorari, we made the same error. Upon discovering that the Solicitor did not agree that the point is immaterial, our factual error was promptly corrected in our Brief in Answer to Memorandum for the United States.

vehicle was $10.45 but they did not disclose the amount of the post-plan rate per vehicle. That evidence could readily have been produced by Volkswagen who assuredly knows its own costs. Volkswagen rested with proof of one item on the debit side of the cost ledger but completely ignored the credits.[15]

(b) Volkswagen's stevedores, following the implementation of the plan, enjoyed increases in their productivity, thus permitting a decrease in commodity rates. (R. 127a; 143a; 155a; 162a; 767.)[16] The evidence is not clear as to whether the post-plan commodity rates included the mechanization assessment ($2.35), or whether such amount was billed by MTC as a separate charge at Volkswagen's insistence. If the assessment was included, as the Examiner believed to be the case (R. 627a), then Volkswagen's total post-plan cost per vehicle was lower than $10.45 by some indeterminate amount. If it was not included in the rate, then it is now impossible to determine whether Volkswagen's total post-plan cost per vehicle was higher or lower than the pre-plan cost of $10.45, but it was certainly lower than $10.45 plus $2.35.[17]

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15. When this area was explored at the hearing, MTC blocked full disclosure claiming business secrecy. (R. 141a-143a.) But, it subsequently developed that Volkswagen's files contained all the pertinent data and it was, therefore, Volkswagen's calculated risk to rely upon inference in lieu of proof. (R. 167a-168a.)

16. The Commission's statement, (R. 670a), that the assessment resulted in a 25% increase in the cost of Volkswagen's unloading expenses is not to the contrary. The amount of the assessment ($2.35) was obviously 25% of Volkswagen's pre-plan cost of $10.45. The Commission could hardly have intended to hold that the assessment was any percentage of Volkswagen's post-plan cost, when this cost had not been disclosed.

17. Of course, even if the mechanization assessment had been added to the pre-plan charges, such fact would only be some evidence of rate fixing by PMA. On the other hand, the fact that this was not done is powerful if not conclusive evidence that rate fixing was not involved.

But, a mere increase in the cost of discharging does not indicate, one way or another, whether price-fixing is involved. Volkswagen's presentation relies heavily upon creating an inference that the cost of discharging its vehicles increased by an amount substantially equivalent to the mechanization assessment, thus suggesting a scheme to fix rates. The Solicitor has been gulled by this argument and, therefore, adopts it. (p. 37.) It simply is not supported by the record.

We emphasize that we do not dispute that the mechanization plan and its assessment does develop one additional element of cost for services to be rendered by the members, and, to the extent stevedore contractors negotiate cost-plus rates with their customers, the added item of costs is included in their calculations.[18] But the plan also purchases economies which promised and achieved substantial decreases in costs, and, to the extent stevedore contractors negotiate cost plus rates with their customers, the reduced items of cost are also included in their calculations. It was this combination of credits and debits to the cost mix which was developed by the plan.

The plan provided the industry with an *opportunity* to operate without ILWU interference. What each operator did with this opportunity would, of course, vary, but the distinction between the action of PMA members within PMA councils and their independent actions as operators must be recognized. (R. 635a n. 22.) Only experience would prove whether a net saving or a net loss would result. The impact

18. Other cost items incurred as a result of participation in the activities of PMA that are also included in such cost-mix are straight time and overtime wages; costs of welfare, pensions, and vacations; PMA membership dues and special assessments. There is no rational basis for withholding supervision by the Commission of the processes by which these costs are established if the assessment formula is covered by Section 15.

on this cost mix would necessarily vary with the many commodities to be handled. Also the experience of each of the many stevedore contractors whose capacities and abilities are not uniform would also develop variations. But, the rates they would negotiate with their customers were entirely their concern and nothing in the mechanization plan and its assessment formula could control those private rates.

Therefore, the inference that the plan and its assessment constituted an agreement to add $2.35, or any other amount per vehicle, to the previous stevedoring rate charged by MTC to Volkswagen is simply contrary to fact.

On the other hand the affirmative findings[19] that such an undertaking did not exist are amply supported by the record. The uncontradicted testimony of Mr. St. Sure, President of PMA, and of Mr. Teige, Chairman of the Funding Committee, discloses that the plan had been adopted to reduce, not to increase, stevedore costs. They pointed out that the funding formula had been adopted without consideration of specific stevedore operations on specific commodities, and that the effect upon the handling of automobiles was not separately considered until after the recommended funding assessment had been developed and questioned at Volkswagen's instigation. (R. 101a; 106a; 120a; 207a-208a; 212a-215a; 231a-232a; 234a-235a.)

The true purpose and effect of the plan was to obtain future cost savings in an indeterminate amount in exchange for costs to be incurred in a specific amount. Thereafter each contracting stevedore (including MTC) was free to work out his own private rates to his customer without interference or dictation from PMA. (R. 126a-128a; 219a-220a.)

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19. R. 637a-639a; 675a-676a; 793-794.

Another serious misconception of fact lies in the assertion that PMA, in using measurement tons for determining assessments, abandoned established practices and adopted a special procedure for the handling of automobiles. The view that a special assessment was devised for the handling of automobiles is contrary to the record.

As set forth in part 3 of our Statement of the Case, PMA employed an *established* practice and rejected *new* approaches when it developed the mechanization assessment. The decision was to levy the assessment in the same manner as "tonnnage dues" had been collected for many years prior to adoption of the mechanization plan. Tonnage dues were collected on revenue tons. Revenue tons are calculated on weight or measurement, whichever is greater. Automobiles in the offshore trade were freighted by the carriers by measurement tons. The previous MTC rates to Volkswagen included PMA dues calculated in this way. This was known to Volkswagen. Volkswagen never protested these practices.

Thus the correct statement of the record is that *Volkswagen* by seeking a mechanization assessment for MTC based on weight tons, was attempting to induce PMA to adopt a *new* practice. This activity is understandable. Shippers continually seek reductions in their costs. But it is seriously inaccurate to urge that the assessment formula was a new approach to assessment of members or was in some manner specially aimed at any shipper.

B. The Fairness of the Charges to Volkswagen.

A considerable portion of the argument presented by our adversaries seeks to spell out some underlying unfairness in the mechanization plan and its assessment formula in its impact upon Volkswagen. This contention is then woven throughout their argument that Section 15 is applicable.

This approach can only be attributed to a misunderstanding of the Section 15 issue because our adversaries surely would not intentionally seek to prejudice this Court by urging immaterial matters.

Whether the particular rate charged to Volkswagen by MTC is fair or unfair may be material to the Section 16 and Section 17 issues of the case, but is not material to whether the mechanization plan and its assessment formula involve an arrangement of the character or type which must obtain Section 15 approval.

If the plan and its assessment formula constitute rate making, Section 15 is applicable even if the MTC rate to Volkswagen is fair. If the plan and its assessment formula do not constitute rate making, Section 15 is not applicable even if the MTC rate to Volkswagen is unfair.

C. The Plan and Its Assessment Formula Are Integral.

It is true that the PMA-ILWU Mechanization Plan and its assessment formula consisted of agreements or contracts or arrangements which involve numerous maritime operators who are themselves parties subject to the Shipping Act. It is also true that the plan and its formula imposed new elements of cost upon the PMA members.

But the formula was an integral part of the labor plan. It is expressly incorporated by reference into the formal plan itself.[20] In fact, it was the employers' performance under the plan. It was the *sine qua non* of the plan. The

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20. Article I, Sec. 12 of the mechanization agreement defines the term "plan" to include "arrangements for assessments and charges for Contributions." (R. 283a.)

Article I, Sec. 8 of the plan defines the term "contributions" in part as follows: "Assessments required of Employers who are Member Companies under arrangements adopted by the Association, pursuant to its by-laws, in order to effectuate this Agreement." (R. 282a.)

provisions quoted in footnote 20, when coupled with the obligations created by Article II § 2 (R. 284a), assure the continuance of each contributing employer's obligations under the Agreement, regardless of whether such employer withdraws from the Association.

If it is to be the law that the members of the maritime industry cannot negotiate industry-wide labor contracts which result in new cost items without first obtaining Section 15 approval from the Maritime Commission, this will be the first case to declare such doctrine.

D. Rebuttal of Suggested Constructions of Section 15.

We do not understand that there is a dispute with respect to our contention that labor relations agreements are exempt from Section 15 in view of the following statements contained in the Solicitor General's brief:

> (1) "We agree that the Commission has not been empowered to supervise labor relations in the shipping industry" and (2) "For purposes of deciding this case, we may assume that agreements which relate solely to collective bargaining or labor relations are excepted from the scope of Section 15 of the Shipping Act." (pp. 30-31.)

The qualification in these concessions is the word "solely". We believe that the Solicitor, because of factual misconceptions, was convinced that rate-making was also involved. Our discussions in Sections A-C, above, demonstrate that the factual predicate for the charge of rate-making simply does not exist.

However, the Solicitor, together with Volkswagen, also seems to urge constructions of Section 15 that would invalidate the plan and its formula, irrespective of whether rate-making is involved. We are compelled, therefore, to answer these strained constructions of the statute.

1. The Plan and Its Formula Do Not Constitute a Cooperative Working Arrangement.

Our adversaries argue that the plan and its formula are reached by Section 15 as a "co-operative working arrangement." This term is construed as requiring regulation of "all collective action" of "combinations of maritime firms", including labor bargaining associations. (VW pp. 22-28; S.G. pp. 21-24.)

The Commission rejected such mechanical application of the Act, but insisted that collective undertakings encompassed within Section 15 must involve those activities affecting ocean transportation, which the Act promotes or restrains.[21] Notwithstanding that ocean transportation is dependent upon the services of longshoremen, the Act does not regulate, in any respect, the conditions of employment of maritime workers. Accordingly, the Commission concluded that the Act does not regulate labor-management relations, and, since the plan and its formula did not involve rate-making, held Section 15 inapplicable. The Commission's decision is a sound application of the "familiar rule" that

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21. In such cases as have been concerned with the meaning of the term "cooperative working arrangement" as used in Section 15, the rule of *ejusdem generis* has been applied to determine the content of the phrase, or it has been assumed that it was included in the Act to preclude avoidance of the regulation of the specific practices enumerated in the section by the "manner" in which the prohibited understanding was reached. See, *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962); *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, 7 F.M.C. 337 (1962); *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962); *Unapproved Section 15 Agreements —West Coast South American Trade*, 7 F.M.C. 22 (1961); *Maatschappij "Zeetransport" N.V. (Orange Line) v. Anchor Line Ltd.*, 6 F.M.B. 199 (1961); *In re Wharfage Charges & Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940); *American Union Transport v. River Plate & Brazil Conference*, 5 F.M.B. 216 (1957), *aff'd sub. nom. American Union Transport v. United States*, 103 App. D.C. 229, 257 F.2d 607 (1958), *cert. denied*, 358 U.S. 828 (1958); *Associated-Banning Co. v. Matson Nav. Co.*, 5 F.M.B. 432 (1958).

conduct "may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *National Woodwork Mfrs. Ass'n., et al. v. NLRB*, — U.S. —, 35 L.W. 4349, 4351 (1967).

Hence, our adversaries tender various strained and even conflicting constructions of other provisions of Section 15 to give credibility to their mechanical interpretations.[22] It is in this context that they urge the provisions which cover agreements "controlling, regulating, permitting, or destroying competition."

The Solicitor asserts (p. 23) that whenever a shipper *alleges* that it "has been victimized by a monopolistic combination of maritime firms," the maritime firms cannot lawfully act until the Commission has completed a Section 15 hearing. To this impractical construction is added the view that any agreement which *could* present a Sherman Act question should be submitted to the Commission for its "scrutiny in advance of implementation." (p. 24.)[23] The Act has never been so construed.

2. The Shipping Act and The Sherman Act Are Not Coextensive.

The Solicitor General acknowledges that some agreements, which affect competition are not within Section 15

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22. Volkswagen (pp. 28-29) under the provisions pertaining to "fixing or regulating transportation rates" reargues its invalid factual conceptions that the plan and its formula concealed deliberate rate-making. Volkswagen (p. 29) and the Solicitor General (pp. 18, 36-42), albeit for opposing reasons, urge that the provisions concerning "giving . . . special rates. . . . or other special privileges or advantages" are being infringed by the plan and its formula. These arguments are rehashes of Section 17 issues which are answered in the text, *infra*, pp. 38-42.

23. Volkswagen's conceptual views are similar to those of the Solicitor General. It asserts that all collective action in the maritime industry is subject to the Commission's scrutiny, and the funding formula, in particular, because "wages always affect prices." (pp. 22-26; 30-31.)

and his citations disclose that the jurisdiction of a regulatory agency must be explicit if, by its exercise, the agency may grant immunity from the antitrust laws. The grant of power to an agency to afford some immunity from the antitrust laws will not be expanded by implication. The policy has been expressed by this court as follows: "Immunity from the antitrust laws is not lightly implied." *California v. F.P.C.*, 369 U.S. 482, 485 (1961); see also *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 348 (1963).

That policy favors a narrow construction of Section 15 and not the expansive one now urged. The construction asserted by the Solicitor would enable the Commission to approve and immunize price-fixing agreements between persons covered by the Act, irrespective of the relationship of the agreements to ocean transportation.

3. Agreements Allocating Fringe Wage Costs Do Not Present Sherman Act Issues.

The Solicitor's view (p. 24) that "an agreement among competitors allocating a shared cost . . . is normally subject to the Sherman Act, since it may have a direct impact . . . on the prices paid by particular customers of the parties to the agreement" is not supportable. The cases cited by the Solicitor involve agreements fixing prices for commodities or services; when an illegal conspiracy exists, the fact that the conspirators shared its costs is irrelevant.

More significantly, the bald principle asserted by the Solicitor cannot be squared with decisions of this Court applying the Sherman Act. A generation ago this Court held that the Sherman Act does not prohibit the elimination of price competition based on differences in wages and other labor costs. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-504 (1940); *see also, United States v. Hutcheson*, 312 U.S. 219 (1941). This Court did not overlook the economic axiom

that "wages always affect prices"; rather, it acknowledged that Congress in 1914 adopted the principle in the Clayton Act that "the labor of a human being is not a commodity or article of commerce,"[24] thus confirming that the prohibitions of the Sherman Act do not cover agreements fixing labor costs, whatever the ultimate effect upon prices.

While the *Apex Hosiery* case did not involve the fixing of labor costs on an industry-wide basis, the principles of the decision are no less applicable. It is a commonplace of American industrial life that industry-wide labor costs are fixed by agreements negotiated between unions and associations of employers. Such associations have been encouraged under the NLRA from the earliest days. As early as 1938 ILWU was certified to bargain with associations of employers of dockworkers.[25] Despite the fact that the activities of such associations have been criticized as frustrating antitrust policies,[26] Congress and this Court have upheld industry-wide bargaining. *NLRB v. Truckdrivers Local 449*, 353 U.S. 87 (1957).

Thus, Congress has left the participants in industry-wide bargaining with "wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solutions of their differences." *NLRB v. Insurance Agents' International*, 361 U.S. 477, 488-490 (1960); *see also, Local 24, et al. v. Oliver*, 358 U.S. 283, 295-296 (1959). Their solutions for featherbedding and automation may involve arrangements where, as on the East Coast, penalty rates are imposed on automated longshore opera-

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24. Clayton Act § 17, 15 U.S.C. § 17.

25. *In re Shipowners Ass'n. of the Pacific Coast, et al.*, 7 NLRB 1002 (1938).

26. Compare Senate debate at 93 Cong. Rec. March 10, 1947, p. 1900 with 93 Cong. Rec. May 12, 1947, p. 5144; *see also*, Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252 (1954).

tions (R. 211a) or, as on the West Coast, benefits are guaranteed to workers displaced by modernization and the entire industry participates in paying for the benefits.[27]

In "this era of automation and onrushing technological change" legislation that would curtail "the ability of management and labor voluntarily to negotiate for solutions to these significant and difficult problems would be preceded by extensive Congressional study and debate, and consideration of voluminous economic, scientific, and statistical data." *National Woodwork Mfrs. Ass'n, et al. v. NLRB*, — U.S. at —, 35 L.W. at 4357. Consequently, this Court should reject the retrogressive constructions of the antitrust laws presented by the Solicitor General. To accept them would undermine a signal achievement of the collective bargaining process in finding a solution for automation.

4. The Shipping Act Should Not Be Construed to Conflict with the NLRA.

Our adversaries' views that "all collective action" or "combinations" of maritime firms are subject to supervision of the Commission under Section 15 lead to the conclusion that PMA and like organizations could not be formed until approved by the Commission. Recognizing that such organizations have existed for over a generation without approval, the Solicitor General hesitantly suggests that Commission approval is not required for the formation of a maritime employers' bargaining association. At the same time the Solicitor tentatively suggests that there is a residual jurisdiction under Section 15 for the Commission to supervise the internal operations of an organization like PMA by, for example, protecting the right of a carrier to withdraw from the bargaining unit. (p. 31.)

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27. Other industries also have fringe benefit plans where the benefits are guaranteed and the employers, within their councils, divide up the cost of the industry plan. (R. 215a.)

Such a construction of the Act would impede the effectiveness of PMA as a labor negotiator. Its ability to prevent withdrawal and to compel compliance with contracts which have been ratified is crucial to PMA credibility at the negotiating table. The Solicitor's suggestion would thrust the Commission into the matrix of the collective bargaining process.

Moreover, the Solicitor's construction produces a conflict with the NLRA. The NLRB has exclusive jurisdiction to determine an appropriate bargaining unit[28] and, as its certification of the ILWU in 1938 demonstrates, that unit may be defined in terms of various associations of particular employers. The risk of conflict between the NLRB and the Commission is obvious, if an association of maritime firms could not bargain with a certified union until the association is approved by the Commission. The risk of conflict would be no less, if the Commission could determine who may withdraw from a certified bargaining unit. In either case the Commission would be empowered to undermine the NLRB determination of an appropriate bargaining unit and its certification.

Nor may this Court assume that the Commission will always exercise its power compatibly with the NLRB determination. The Shipping Act does not direct the Commission to promote the policies of the NLRA and it may make its determinations within the narrower limits of the Shipping Act.[29] In any event, this Court has repeatedly limited the

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28. 29 U.S.C. § 159.

29. See views of Examiner on this subject, (R. 649a-650a.) Section 401 of the Federal Aviation Act [49 U.S.C. § 1371 (k)], directs the C.A.B. to promote the policies of the Railway Labor Act, which governs labor-management relations of the airlines, thus accounting for the willingness of the C.A.B. to assert jurisdiction in *Airlines Negotiating Conference Agreement*, 8 C.A.B. 354. Such differences between the Aviation Act, on the one hand,

jurisdiction of other tribunals, state and federal, when mere risks of undermining NLRB certifications were threatened.[30]

Furthermore, the Commission cannot be granted the powers, suggested by the Solicitor, without materially circumscribing the right and duty, under the NLRA, of labor and management to resolve industrial problems. The tonnage assessment employed by PMA to fund the Plan is the very device proposed by ILWU, except that it was two cents per ton less than the ILWU proposal. (R. 210a.) The willingness of ILWU to allow PMA to promulgate an assessment formula instead of insisting upon its inclusion *in haec verba* within the Agreement does not alter the economic effect of the assessment.[31] If implementation of the assessment were to depend upon Commission approval, the power of ILWU as well as of PMA to negotiate solutions for industrial problems would be subject to restrictions not imposed in other industries.

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and the Shipping and Interstate Commerce Acts, on the other, may partially explain why the airlines industry does not bargain on an industry-wide basis as do the rail, shipping and trucking industries. *Six Carriers Mutual Aid Pact*, 29 C.A.B. 168, involves an agreement providing for the pooling of revenues and not the sharing of industry-wide labor expenses.

30. *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *LaCrosse Telephone Corp. v. WERB*, 336 U.S. 18 (1949); *Inland Empire Dist. Council v. Millis*, 325 U.S. 697 (1945); *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

31. The undisputed testimony of Mr. St. Sure makes clear that the ILWU willingness was induced by his assurances to Mr. Bridges that the Plan would be funded by tonnage or man-hour assessments or combinations thereof, and that insistence upon an express provision would delay conclusion of an agreement because larger principles were thereby being introduced into their negotiations. Mr. St. Sure having been the author of these assurances to the ILWU did not doubt the continuing interest of ILWU in the funding method developed by PMA. (R. 210a-212a.)

These are not insignificant restrictions. This litigation, which has already consumed five years, demonstrates that implementation of a labor contract could be delayed for years after it was negotiated. The Commission, unlike the Internal Revenue Service and Wage and Hour Administration, cannot give effective interlocutory approval, if the agreement is challenged.

Nor is it any answer to suggest that Commission approval could be sought for mere portions of an agreement.[32] Labor agreements require commitments for all issues solved during negotiating sessions. The commitments are, as the negotiations of the mechanization agreement disclose, interdependent.[33] Hence, Section 9, Article VI of the Agreement provides that if "any portion of the Plan is held unlawful" the obligations of PMA members thereunder will be immediately suspended. (R. 308a.)

Furthermore, a construction of Section 15 that suggests that the negotiation, administration and implementation of labor agreements are within Section 15 would necessitate numerous filings with the Commission. A Section 15 agreement cannot be implemented until it is approved. The potential penalty[34] of one thousand dollars a day per person involved in an unapproved Section 15 agreement assures that maritime firms will proceed cautiously if there is any risk of Section 15 coverage. Thus, virtually every labor agreement, irrespective of whether it is ultimately held to be within the Section, would be filed and would risk fatal delay at the whim of a single objector. Consequently, a public commission would replace the parties

32. The Solicitor General so suggests at pp. 32-33 of his brief.

33. See Mr. St. Sure's description of negotiations. (R. 200a-205a; 230a.)

34. 46 U.S.C. § 814.

to the bargaining process for development of solutions to maritime labor problems.

No provision of the Act, court decision, or legislative history justifies a construction of the Shipping Act that would thus deprive either the employers or employees of the maritime industry of the protection afforded by the NLRA. The Solicitor's fanciful theories concerning legislative intention to curb monopoly power cannot establish that Congress in 1916 placed the Commission athwart industry-wide bargaining processes which were not then within the contemplation of anyone. Even when the Act and its administration by the Commission were reviewed in recent years, no one criticized the Commission for not assuming a supervisory role in maritime labor-management relations.[35]

On the contrary, many years ago Congress manifested a clear intention to afford the maritime industry full participation in the public policies promoted by the NLRA. The severe labor disturbances suffered by the maritime industry in the thirties[36] stimulated Congress to add Title X[37] to the Merchant Marine Act of 1936.[38] Title X created a Maritime Labor Board, whose primary responsibility

35. Hearings before Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, 86th Cong. 1st Sess. (1959); Hearings before Special Subcommittee on Steamship Conferences of Committee on Merchant Marine and Fisheries, House of Representatives, 86th Cong. 1st Sess. (1959) Steamship Conference Study; Hearings before Merchant Marine and Fisheries Subcommittee of the Committee of Commerce, U.S. Sen., 87th Cong. 1st Sess. on H.R. 6775 Steamship Conferences/Dual Rate Bill (1961); Hearings before Special Subcommittee on Steamship Conferences of the Merchant Marine and Fisheries, House of Representatives, 87th Cong. 1st Sess. on H.R. 4299 (1961).

36. *See, Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

37. Act of June 23, 1938, ch. 600, §§ 45 *et seq.*, 52 Stat. 965 (repealed).

38. 46 U.S.C. §§ 1101 *et seq.*

was to foster amicable labor-management relations in the shipping industry. Yet, Title X expressly provided that its provisions shall not "in any manner affect or be construed to limit the provisions of the National Labor Relations Act."

The Maritime Labor Board made a thorough study of labor-management relations in the industry and, in 1940, reported to the President and Congress.[39] A chapter of the Report was devoted to the many maritime employers' associations then in existence. The Board did not suggest that the extensive operations of these organizations—all of which affected maritime labor costs and, in turn, had an effect on rates, fares and charges of the industry—in any fashion frustrated the policies of the Shipping Act, 1916. This silence of the Maritime Labor Board cannot rationally be explained as a failure to grasp the economic relationships between wages and prices. The silence is merely another indication that the Board was aware that the regulations of restraints on competition that are covered by the Shipping Act do not encompass agreements resulting from collective activities encouraged and protected by the national labor policies.

5. Sherman Act Remedies Are Not Impaired.

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1965), any doubt as to the self-executing potential of Section 15 was laid at rest. It is now established that failure to file and obtain the Commission's approval under Section 15 precludes antitrust immunity and leaves any damaged party free to pursue his antitrust claims.

Thus Volkswagen's suggestion that there is a risk that anti-competitive conduct may not be subject to effective control, is without merit.

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39. Maritime Labor Board. Report to the President and to the Congress (1940).

Volkswagen's second suggestion (p. 42) in this area deplores potential delay if an antitrust action is stayed pending determination by the Commission of whether an agreement has been given Section 15 approval. This apprehension is ill-founded if the Commission's ruling in the instant case is honored, because the Commission has determined that agreements relating to collective bargaining are not within its jurisdiction. The only real risk of dilatory tactics would arise if our adversaries' contentions were adopted because, in such case, potential conflicts between the NLRA and the Shipping Act would require the Commission (which has no particular expertise in labor matters) to give a prior determination as to which act should be deemed dominant.

The Solicitor General takes a different tack. He suggests that the industry may need antitrust immunity for its labor contracts in order to encourage maritime firms to abide by them and, therefore, the Solictor urges that the Commission should have the power under Section 15 to grant such immunity. (pp. 25-26.)

The risk of suits under the Sherman Act has always been known to PMA members. That risk exists whenever collective action of an industry is involved. That risk has not in thirty years dissuaded maritime firms from implementing their industry-wide labor contracts. Here, the Solicitor urges a position inconsistent with the *Carnation* case that "those who drafted the Shipping Act . . . decided not to give the industry complete anti-trust immunity." 338 U.S. at 220. The Solicitor would aggravate administration of labor and antitrust policies by empowering a regulatory agency, whose expertise is limited to rate-making and like trade practices, with authority to determine all questions arising out of collective bargaining which may involve actions prohibited by the antitrust policies of the United States.

Thus, we reach the suggestion that the Commission should have jurisdiction over conspiracies contained in collective bargaining agreements. Volkswagen has asserted the existence of a "cat's paw" conspiracy. The argument is that PMA, with the help of ILWU, has compelled Volkswagen, as an outsider, to contribute to the mechanization fund under a special formula designed to transfer to Volkswagen labor costs which the liner interests of PMA would otherwise have to assume.[40]

The Examiner noted that these contentions were first propounded after the hearing had terminated, but found "no substantial evidence" to support them. (R. 649a, n. 42.) The Examiner refused to determine whether such alleged actions of PMA members were prohibited under the antitrust laws. (R. 651a.) The court of appeals, recognizing that Volkswagen's theories of a "cat's-paw" conspiracy were not presented by this litigation, carefully preserved petitioner's right to a hearing in the federal courts under the Sherman Act. (R. 801, n. 13.)

Nonetheless, echoes of these theories emanate from the opposing briefs as evidenced by the Solicitor's interjection into this case of *Mine Workers v. Pennington*, 367 U.S. 657 (1965), and *Meat Cutters v. Jewel Tea*, 367 U.S. 676 (1965), which suggests that a "cat's-paw" conspiracy is presented. Doubtless the Solicitor General would agree that the industry is entitled to a trial on these issues before a decision is made and that raising such issues for the first time after the hearing has terminated would not afford fundamental

40. This theory was in addition to the contention, already shown to rest on mistaken facts, that PMA members were rate-making. The "cat's paw" theory is an obvious cover for Volkswagen's failure to obtain quotations of rates from stevedore contractors who are not members of PMA. (R. 173a; 765-766.) Incidentally, the existence of a cat's paw conspiracy is categorically denied.

due process. We protest the implications of theories that would expand the Commission's jurisdiction under Section 15 to cover such conspiracies. Such expansion would lead to serious conflicts between the Commission and federal district courts.

The effectiveness of a "cat's-paw" conspiracy is dependent upon the cooperation of the labor union involved. The Commission does not, and cannot by any twisting of the provisions of the Shipping Act, obtain jurisdiction over maritime unions or their members. Only the federal district court can reach the union. Thus, if the Commission were to acquire primary jurisdiction over the employer "conspirators", piecemeal litigation would necessarily result. Each tribunal proceeding independently could reach opposing conclusions. Such conflicts should not be risked when the Sherman Act already provides the remedy of treble damages to a party damaged by a "cat's-paw" conspiracy.

E. Summary of Section 15 Issues.

Three arguments have been made by our adversaries for application of Section 15 to the Mechanization Plan and its assessment formula.

First: It is argued that PMA and its members were engaged in rate making. This argument is based on the inference that MTC was impelled to add to its former rate the amount of its mechanization assessment because that amount was added to MTC's costs. This has been demonstrated to be a false inference because: (1) such inference is not valid once it is recognized that MTC enjoyed offsetting cost savings attributable to the plan and (2) the actual experience of MTC was otherwise.

There is no substantial evidence to support this inference and the Commission so found.

Second: It is urged that the Mechanization Plan and its assessment formula involve some anti-competitive activity similar to a "cat's paw" agreement. Again no substantial evidence exists to support this suspicion and the findings below are to the contrary. But even if some antitrust violation has occurred, there is no reason to transfer its policing from the Sherman Act to the Shipping Act. Volkswagen's pending suit in the Federal District Court, which has been stayed pending these proceedings, can afford adequate relief if the assertions can be removed from the realm of speculation and brought into the area of proof.

Third: It is also implied that the Shipping Act gives the Commission jurisdiction over maritime labor management affairs. If true the conflict which would develop between the NLRA and the processes of collective bargaining, on the one hand, and the Shipping Act on the other, would lead to hopeless confusion in the industry and would actually end up with *less* remedial aid for damaged parties than is available under existing divisions of administrative, judicial and collective bargaining functions.

It would be ironic to overturn the first agreement which has provided a solution to the crucial problems created by automation and promises peace on the Pacific Coast waterfront.

II. THE COMMISSION'S DETERMINATION OF THE SECTIONS 16 AND 17 ISSUES IS CONCLUSIVE.

It is not clear whether our adversaries consider the rulings below on Sections 16 and 17 as presenting substantial questions, irrespective of whether this Court agrees with their position on Section 15. While we have sought to demonstrate that the fairness or unfairness of the mechanization assessment is immaterial so far as it concerns Section 15, those considerations are material to the Sections 16 and 17 issues.

If the rate charged to Volkswagen resulted in an undue or unreasonable prejudice or disadvantage to it, Section 16 was violated.

If the charges to Volkswagen are founded upon an unjust or unreasonable practice, Section 17 was violated.

There is no doubt that *Consolo v. FMC,* 383 U.S. 607 (1966), requires judicial restraint and deference to the agency's factual determinations. It is also clear that the court's affirmance of the Commission's decisions followed a careful consideration of Volkswagen's complaints.

A. The Section 16 Issue.

Volkswagen conceded at the outset that the Commission has consistently held that Section 16 only prevents discriminations between competitive cargoes. (R. 676a.) The Solicitor General concedes that the ICC applies the same rule for administration of identical provisions of the Interstate Commerce Act. (p. 35) Yet, the Solicitor charges the Commission with "fatally inadequate" analysis and now asserts, with Volkswagen, that a different result is required by *New York Freight F & B Assn. v. Federal Maritime Commission,* 337 F.2d 289 (CA 2d 1964) *cert. den.* 380 U.S. 910 (1965). This very case was cited by Commissioner Patterson (R. 716a.), the sole dissenter on the Sections 16 and 17 issues. It is therefore incorrect to suggest that the Commission failed to consider the applicability of that case when it held the "competitive cargoes" rule to be controlling.

In the *New York Freight Forwarders* case, the practice of freight forwarders to charge different customers random prices of widely-varying amounts for "substantially identical services" was held an infringement of Section 16, regardless of whether competitive cargoes were involved. The controlling point was that charges of widely-varying amounts were made for substantially identical services and

so were "prima facie discriminatory." (*Supra* at p. 299.) Clearly, MTC charges for handling different types of cargoes are not for substantially identical services, and there is no showing that MTC charged different rates for handling automobiles. The services required for handling canned goods, locomotives and automobiles are materially different, and quotations of varying charges is to be expected. The proposed modification of established regulatory practice should be rejected.

B. The Section 17 Issue.

Volkswagen renews evidentiary arguments that have been considered and rejected by the Commission and the court. It reargues that its stevedores did not benefit from the plan commensurate with their costs thereunder, and complains that longshore operations involving bulk cargoes and coastwise lumber were afforded special assessments denied its stevedores. (pp. 55-56.) On the other hand, Volkswagen disregards the finding that its commodity rate decreased and that its stevedores increased productivity as the consequence of benefits attributable to the mechanization plan. As for the lower assessment accorded to bulk cargo operations, Volkswagen ignores that this merely continued the historical industry practice for collection of PMA tonnage dues. (R. 114a.) Finally, the assessment applicable to the handling of coastwise lumber could not affect assessment of other PMA members because the firms principally interested are not members of PMA and their contributions *are additions to* the mechanization fund to be accumulated by PMA members.[41]

41. (Art. I § 2(b), R. 284a; Exh. 1-I, R. 340a-342a.) It is notable that the PMA decision to afford a lower rate to these nonmember employers who requested participation in the Plan is the converse of the action condemned in the *Pennington* case. The PMA action was taken to revitalize a trade that had become marginal. (R. 115a-116a; 185a; 212a; 221a-223a; 232a-233a.)

The Solicitor General, while echoing some of these contentions, stresses that the Commission and the court below should have held that PMA devised a "special formula" unduly burdening the handling of automobiles. The Solicitor's concern is founded on misunderstandings:

First: It is asserted that, as a consequence of expenses incurred under the plan, MTC was required to increase its charges by the amount of its assessment. (p. 37.) We have shown (*supra,* pp. 4, 9-10, 15-20) that no such requirement or compulsion was involved.

Second: It is "stressed" and "emphasized" that the Association devised a special formula applicable only to automobiles (pp. 37, 41); that is to say, PMA acted unreasonably by insisting upon the use of measurement instead of weight and thereby multiplied by ten MTC's cost attributable to the plan. The implicit assumptions are that the base which would produce the lower assessment is always fair, and that the alternative which produces the higher charge is always unfair. (pp. 36-37.)

The Solicitor fails to realize that when choosing between the use of measurement or weight for the computation of *revenue tons,* the base that will render the greater revenue is always selected.[42] Consequently, PMA tonnage dues, being always computed on the same basis as *revenue tons,* will always be higher than would be the case if the alternative tonnage basis for computation were selected. On the Solicitor's argument *every* commodity could complain of the alternative applied to the assessment of its stevedores.

We have shown that the mechanization assessment is computed in all instances in the same fashion as PMA tonnage dues and, in the case of automobiles, the computations of *dues and assessments* are made on the basis of measurement. (*Supra,* pp. 7-8, 20.) We have also shown (*supra,*

42. *Supra,* p. 7, n. 7.

pp. 8, 20) that Volkswagen fully appreciated and did not complain that PMA tonnage dues were historically computed on the basis of measurement. Therefore, when it challenged measurement and proposed weight as a basis for computation of the mechanization assessment, *Volkswagen* was seeking a special formula. Thus, PMA did not multiply a cost item by ten; it was Volkswagen who sought to divide the item by ten.

Surely, the Solicitor General did not intend to misrepresent the record when he asserted that PMA "devised a special formula" for the handling of automobiles. He simply must have misunderstood (1) the findings concerning entries on ship manifests; (2) the differences between freighting practices and computation of charter hire; and (3) the irrelevancy of coastwise and intercoastal freighting practices.

Re (1) above: When the industry refers to a cargo "as manifested" by weight or measurement, it is referring to how freight revenues are computed. (R. 100a.) The ship's manifest, however, may have entries for many other purposes. Thus, entries on the manifest may show weight, measurement, and/or units of a consignment, irrespective of how the cargo is converted into "revenue tons."[43] The Commission properly noted that there is no uniform practice with respect to the entries that may be shown on the manifest (R. 669a-670a), but it did not suggest an absence of uniformity in computing freight for the carriage of automobiles in the offshore trade. To the contrary, the Commission held that in the offshore trades, such freight rates are "dependent upon measurement," even though, for the shipper's convenience, they may be quoted by unit. (R. 670a.)

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43. Bross, Ocean Shipping (Cornell Maritime Press, 1956) p. 202.

Re (2) above: In the cases where an entire ship is chartered, freight, as such, is irrelevant. Charter-hire is rental for the vessel and is not dependent upon the volume, weight or units of cargo involved. As Volkswagen's representative confirmed, "no freight [is] shown on the charter ship's manifests," and, since charter-hire is paid in a lump sum, "Volkswagen always manages to put as many cars aboard as they can squeeze in." (R. 165a-166a.) Thus, the Commission found that the entries on the manifests of Volkswagen's chartered ships are not uniform. (R. 670a.) Such entries have no relationship to freight rates or revenue tons.

PMA tonnage dues, however, are computed on the basis of "revenue tons," (R. 217a.) and, the underlying premise upon which dues are assessed is that all "member companies shall pay on exactly the same basis." (R. 81a; 217a-218a.) Thus, whenever tonnage dues are computed on the handling of cargo moving under charter, the dues are determined on the same basis as though the cargo had moved on a common carrier. This assures all members pay dues on the same basis. (R. 111a-112a; 217a-218a.) This practice explains why Volkswagen's stevedores paid their PMA tonnage dues on the basis of measurement without protest. It also explains why the use of measurement tonnage for computation of the mechanization assessments was *not* a "special formula" for the handling of automobiles moving on chartered ships.

Re (3) above: For the purposes of argument, we may concede that all cargoes moving in the intercoastal and coastwise trades, which compete with land carriers, are freighted by weight to permit ready comparison with rail and truck rates. But automobiles *are not carried* in the coastwise or intercoastal trades. Thus, the PMA instructions to its members to report automobiles always on the

basis of measurement had no bearing on a non-existent intercoastal and coastwise traffic. The suggestion that these instructions were intended as a modification of practices applicable to those trades is nothing but an imposition by Volkswagen upon the Solicitor, the Commission, the Court of Appeals, and now this Court.

* * *

The errors which we have noted in connection with Sections 16 and 17, derive from the difficulties of grasping the factual complexities inherent in this type of case. The danger of committing such errors emphasizes the wisdom of the *Consolo* decision. It was a mistake to ask this Court to consider the Sections 16 and 17 issues.

CONCLUSION

The judgment below of the Court of Appeals should be affirmed as to Section 15 and, as to Sections 16 and 17, the Writ of Certiorari should be dismissed as having been improvidently granted.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
NOV. 1 1967
JOHN F. DAVIS, CLE

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATON,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief for Intervenor Marine Terminals Corporation

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Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Brief for Intervenor Marine Terminals Corporation

Intervenor Marine Terminals Corporation ("MTC") submits this brief principally to point out the most egregious errors, fallacies and misconceptions in the brief filed on behalf of the United States. To avoid needless duplication and burden on the Court and the parties, MTC adopts the preliminary material appearing in the brief for Intervenor Pacific Maritime Association ("PMA").

ARGUMENT

In 1960, the West Coast waterfront unions and employers concluded a historic agreement by which, through their own joint effort, they solved the social and economic problems of automation and brought to an end a generation of labor strife. Now, seven years later, the United States in this Court attacks the implementation of this agreement and threatens its continued existence. It does so at the behest of Volkswagen, a German manufacturer of probably the most successful automobile of all times, which complained of the level of assessments on automobiles for the Mechanization and Modernization Fund ("Mech Fund") created by the agreement. It does so in direct contradiction of the position it took before the Court of Appeals. It does so by a brief which rests on wholly unwarranted assumptions and is characterized by pervasive fallacies, misconceptions and contradictions.

That petitioner Volkswagen ("VW") should bend every effort to maximize its profit by minimizing its discharge cost is understandable. MTC itself, to reduce its cost of unloading the cargo of its good customer VW, sought to negotiate a reduction of the assessment on automobiles. All of the arguments in favor of a reduction have been heard, considered and rejected by those in the best position to pass judgment on them—the PMA, the Commission's Examiner, the Commission and the Court of Appeals. For the United States now to reverse the position it took in the Court of Appeals[1] and to seek this Court's intervention on behalf of VW essentially on the basis that the Mech

1. Both the Government's brief below and its brief here were signed by Assistant Attorney General Donald F. Turner on behalf of the Department of Justice. For the Court's convenience, a copy of that brief is attached hereto as Appendix A.

Fund assessment on automobiles was too high is incongruous and, as we will undertake to show briefly below, wholly unwarranted.

I. The Government's Misconception That This Is a Friendly Suit.

Without citing record support, the Government accuses MTC and PMA of collusion to bring a "friendly suit." (Br. 28, fn. 12)[2] The record reflects the contrary. A memorandum of PMA's Coast Steering Committee, issued a few months before the filing of PMA's libel against MTC, states in unmistakable terms that "PMA reserves the right to institute action against Marine Terminals if Marine Terminals is itself still in default of Mechanization Fund Assessments" and that "PMA advises Marine Terminals, and all other companies owing assessments on Volkswagen, that such assessments are due." (R. 518, Ex. 31) There was nothing "friendly" about the position reflected in that memorandum, nor about the libel subsequently filed by PMA against MTC to recover unconditionally the assessments of over $85,000 then accrued and all future assessments.

While the point is irrelevant, it is the kind of inflammatory, misleading and unsupported allegation with which the Government's brief abounds. The impression it seeks to create of VW being "victimized by a monopolistic combination of maritime firms" and as a result having "to yield to the marine terminal companies' demand that it shoulder the burden of the assessment" (Br. 23) is completely false, and the Government's generous use of loaded adjectives does not cure its error. The interests that bind MTC to VW, its prime customer, are at least as powerful as those that bind it to PMA, its collective bargaining

2. The Government's brief is cited as "Br. .....".

association. That is why MTC sought to assume the role of being merely a collection agency (R. 486, Ex. 9), but without success, for PMA sued it in the District Court to collect the assessments, and VW sued it before the Commission for violating the Shipping Act. That this controversy should have arisen in the first place has been most unfortunate for MTC; now to be confronted with the Government's unsubstantiated and irresponsible charges is adding insult to injury.

II. The Government's Fallacious Position Concerning the Applicability of Section 15 of the Shipping Act.

A. THE GOVERNMENT'S FUNDAMENTAL ERROR IN ITS APPROACH TO THE INTERPRETATION OF SECTION 15.

While we do not intend to plow here the ground covered by the briefs of PMA and the Commission, we wish to emphasize the fundamental error in the Government's approach to the interpretation and application of Section 15 which is epitomized by this statement:

> "The burden of persuasion on the question of the applicability of Section 15 would seem to lie with those who would carve out an exception to the broad statutory language, which so clearly covers the type of agreement involved here." (Br. 19)

Whatever else may be said of Section 15, its thrust is to create an exemption under the antitrust laws for approved agreements. *Carnation Co. v. Pacific Conference,* 383 U.S. 213, 216 (1966). This Court has held consistently that such exemptions are to be construed narrowly, not broadly, as the Government contends here. Immunity from the antitrust laws is not lightly implied. *California v. Fed. Power Comm'n.,* 369 U.S. 482, 485 (1962); *U. S. v. Philadelphia Nat. Bank,* 374 U.S. 321, 348 (1963). By advocating a broad construction of Section 15 to achieve its purposes in this

case, the Government is asking the Court to turn its back on a settled policy of construction.

The Government's purpose in pursuing this tack is obscure at best. Secrecy is not an element in this case; petitioner has had no difficulty in spreading all of the facts on the record, and the Commission, moreover, would, without regard to the applicability of Section 15, have the power to compel persons subject to the Act to disclose their charges and transactions and agreements pertaining to their business. 46 U.S.C. Sec. 820. Protection of petitioner's interests is not an element either. If, as respondent and intervenors maintain, the agreement is outside the scope of Section 15, the protection of the antitrust laws remains fully available to petitioner. See, *United States v. Borden Co.*, 308 U.S. 188, 200 (1939).

B. THE GOVERNMENT'S MISLEADING QUANTITATIVE ATTACK ON THE ASSESSMENT.

While the Government at the outset professes that "the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission" (Br. 17), the balance of its brief is largely devoted to a quantitative attack on the agreement (i.e., on the *level* of the assessment payable by members with respect to automobiles). Thus it says, inter alia, that

> "Foreign automobiles were assessed much more heavily than other forms of cargo. . . ." (Br. 2)
>
> "The assessment on foreign automobiles (principally Volkswagens) was so high . . . that the stevedore contractors . . . were unable to absorb it. . . ." (Br. 14)
>
> "It burdens one class of cargo—automobiles—far more heavily than any other. . . ." (Br. 15)

The quantitative attack culminates in the totally inconsistent plea that

> "[u]nless the agreement is declared unlawful, petitioner will have to yield to the marine terminal companies' demand that it shoulder the burden of the assessment. . . ." (Br. 23)

It should go without saying that the level of the assessments is irrelevant to the determination whether or not they constitute a Section 15 agreement.

Nevertheless, the Government appears to contend that because the relative size of the assessment allegedly made it necessary to "pass it back to the shipper" (Br. 27), an agreement to do so comes into existence ipso facto and brings Section 15 into play. Its present position is diametrically opposed to that taken in its brief in the Court of Appeals where it accepted the Commission's finding that there was no agreement on whether to absorb or pass on the assessment (p. 20) and went on to say that "[t]he fact that [MTC] is passing them on to petitioner is a decision that it has reached by itself." (p. 24) Its present position, moreover, is economic nonsense and is refuted by the record and the findings below.

By definition any business operating at a profit passes its costs on to its customers. The effect is the same whether PMA agrees on increased wage rates for longshoremen or on contributions to the Mech Fund. Ultimately, these elements go into the cost mix along with all other costs, and the customer must pay them. (Cf. Br. 27, fn. 11) Surely the Court is not going to draw the line defining the reach of Section 15 by comparing the cost increase with the stevedore's profit margin!

Moreover, the Government's argument flies into the face of the Commission's finding that there was no agreement

among PMA's members to pass on the Mech Fund assessment. (R. 675-676; see also R. 638-639) Before the Court of Appeals the Government urged that the passing on of the assessment to VW was "a decision that [MTC] has reached by itself" (p. 24) and that there was substantial evidence to support the Commission's determination of this factual issue (p. 20), and the Court so held. For this Court now to accept the Government's new contention (made without any attempt to marshal record support) would be to make a farce of the Court's decision in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966).

The Government's argument is based on the assumption that the assessment agreement had a "direct and substantial impact on shippers" because "[a]s all concerned well knew, the terminal companies had to pass it back to the shipper in the form of a higher charge." (Br. 27) To begin with, the argument is a non sequitur. VW in the context of this case is not a shipper but a purchaser of stevedore services. Its position here is that of a person chartering vessels and arranging to have them unloaded. So far as the record discloses, the transportation rates to shippers, including VW, which cover also the unloading of cargo, did not increase after the assessment went into effect. (R. 175, 177)

Moreover, the Government's assumption is not supported by the record—there is no evidence that the *total* cost to discharge automobiles increased, and VW's failure to produce evidence to that effect is eloquent proof of the contrary.

Finally, the Government in making the argument is less than candid, for the record states (and the Examiner found) that after the assessment against MTC went into effect, the contract rate which MTC charged VW was renegotiated and *decreased.* (R. 155) As of the time of the

hearing in April, 1963, VW was "enjoying a lower rate than they were in 1961." (R. 162, 627)[3]

As we have said, the amount of the assessment is irrelevant to the Section 15 issue, but if it is to be considered in this case at this stage, it must be considered along with the total cost of discharging VW's automobiles. The decline in the rate charged VW by MTC after the Mech Fund came into being strongly suggests that its implementation achieved its purpose of lowering the cost of discharging cargo. And that VW's over-all cost of discharging its vessels on the West Coast declined after 1960 can safely be presumed, for had it been otherwise, VW would certainly have produced evidence to prove it. That in the face of this record the Government can characterize the Mech Fund assessment as a "perfect example" of how "[a] shipper may be harmed by an agreement among the firms with whom he does business" (Br. 27),[4] bespeaks an attitude of total indifference to the true situation reflected by the record.

III. The Government's Fallacious Positions Concerning Sections 16 and 17.

A. MTC HAS NOT BEEN FOUND TO BE SUBJECT TO THE SHIPPING ACT FOR PURPOSES OF THIS CASE.

Petitioner contends that the "disproportionate assessment which the [assessment] agreement imposes on automobiles violates Sections 16 and 17" and the Government agrees that a "strong case of unreasonableness is thus made out." (Br. 34, 42) Both the Government and petitioner

---

3. The Government's assertion that the cost of unloading VW's was increased by over 20 percent (Br. 7, 37) is based on a self-serving letter written by VW's agent in November, 1961, *predicting* such an increase. (R. 511-512, Ex. 26) Neither the Government nor that letter take into account the subsequent *reductions* in the contract rate negotiated between MTC and VW.

4. The published industry statistics, reflected in Appendix B, show that there hardly is occasion for concern.

completely ignore the threshold question whether these sections, by their terms, apply here. The Government simply assumes MTC to be a person subject to the Act. (Br. 18)

The charges which VW pays, it pays to MTC, not PMA. Thus the relevant relationship which affects VW is only the relationship between VW and MTC. This was explained clearly by the Examiner whose statement was quoted with approval by the Government in its brief below:

> "The Examiner recognized the necessity for focusing only on the relationship between petitioner and MTC:
>
> 'As stated above, neither PMA nor the agreement between and among PMA members has been found subject to the Act. For that reason we do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement. Volkswagen is complaining about Respondents practice of including the Mech fund assessment in its stevedoring rate. *This discussion concerning Section 17, therefore, deals with the relationship between Respondents/ MTC/ and Volkswagen.* (I.D. 35, *emphasis supplied*)'." (pp. 24-25)

Section 16 makes it unlawful for "any common carrier by water, or other person subject to this Act" to subject any person or description of traffic to undue or unreasonable prejudice. Section 17 requires "every such carrier and every other person subject to this act" to establish just and reasonable regulations and practices.

What this case involves are the charges by MTC against VW for discharging automobiles from VW's chartered vessels. Those charges are based entirely on private contract voluntarily negotiated by these parties. (R. 139, 155) They have never been published, filed or in any other respect subject to regulation or supervision by the Commission.

So far as the transactions between VW and MTC are concerned, MTC, which clearly is not a common carrier, is not an "other person subject to the Act." Section 1 of the Act defines such "other person" to be one "carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal *facilities* in connection *with a common carrier by water.*" (emphasis added)

Whatever other activities MTC may engage in in other connections, this case and this record relate to its furnishing of stevedore service pursuant to *private contract* in discharging cargo for VW from VW's *chartered* vessels.

For this reason MTC, from the beginning of this litigation, has maintained that the transactions involved here are not subject to the Act and for this reason alone are not subject to attack. While the Examiner found MTC to be a person subject to the Act (R. 641-642, 672), the Commission refused to do so and simply "assumed", without deciding, that MTC was subject to the Act for purposes of the decision. (R. 673)

The threshold jurisdictional issue, properly passed by the Commission because its other rulings were dispositive, has therefore not been decided. It is obviously the kind of mixed question which, if it needed to be decided, ought in the first instance to be decided by the agency responsible for the administration and enforcement of the statute, not this Court.

B. SECTION 16.

The Government now says, contrary to the settled law under both the Shipping Act and the Interstate Commerce Act, and contrary to its position in the Court of Appeals, that no competitive relationship is necessary to establish discrimination under Section 16. The position is a complete reversal of its position before the Court of Appeals.

It now purports to rely on *New York Foreign Frgt. F. & B. Ass'n v. Federal Maritime Com'n.*, 337 F.2d 289 (2nd Cir. 1964) *cert. den.* 380 U.S. 914 (1965), which it distinguished in its brief in the Court of Appeals on the ground that

> "[i]n the instant case, the assessments bear a direct relationship to the type of cargo carried or handled, and thus a competitive relationship must be shown. Both the Examiner and the Commission, we submit, correctly found no violation of Section 16." (p. 23)

What the Government said in the Court of Appeals is still true. Section 16 is aimed at discriminatory treatment levied against persons standing in a competitive relationship. Where all persons standing in such a relationship are accorded the same treatment, the vehicle for attacking that treatment is Section 17. Inasmuch as Section 17 provides a remedy, there is no reason to give Section 16 a tortured and unwarranted interpretation.

C. SECTION 17.

The Government's argument seems to be pitched on the theory that it was unreasonable for PMA to assess automobiles on a measurement, rather than weight basis, because it results in a "charge" that causes "disparate treatment" and is "grossly disproportionate", "seemingly arbitrary" and "very substantial". (Br. 36, 37, 40)

One obvious difficulty is that, as the Government pointed out in its brief to the Court of Appeals,

> "[i]n the context of the allegation of a section 17 violation, it must be kept in mind that petitioner is charging MTC and not PMA with the violation. And, it is PMA's membership that made the decision as to how the assessments for the fund were to be made, and more particularly, that assessments on auto-

mobiles were to be made on the basis of 'measurement ton.' Therefore, MTC is paying assessments to PMA as PMA's membership has directed. The fact that it is passing them on to petitioner is a decision that is [sic] has reached by itself. The Commission recognized that MTC's activities were reasonable because 'they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.'"

* * * * * * * *

"Respondents submit that this is an area where the expertise of the agency is entitled to its greatest weight. Both the Commission and the Examiner examined all the pertinent facts and found that MTC's conduct did not violate section 17." (pp. 24, 25)

The Government now ignores completely these compelling grounds on which it urged the Court of Appeals to affirm.

Another obvious difficulty is that the record does not disclose the level of the *charge* which the Government considers excessive and unreasonable. As pointed out above (pp. 5-8), the charge to VW is its *total* cost of unloading an automobile, i.e., the commodity contract rate negotiated between VW and MTC, and the portion attributable to MTC's Mech Fund assessment is but one of a number of elements going into the cost mix. If, as may be presumed in view of the evidence and VW's failure to produce evidence to the contrary, the total cost to VW actually declined (or did not increase over the amount by which wage rates and other costs increased), the bottom falls out of the Government's Section 17 argument.

If there were really a basis for the Government's charge that automobiles were given "grossly disproportionate"

and "arbitrary" treatment, one might have expected the petitioner below to produce evidence of its unloading costs, how they compared with those paid by other cargo and how they were affected after the assessments become effective. No such evidence was offered, and the failure to have done so strikes at the heart of petitioner's and the Government's arguments here. (See p. 8, fn. 3, above)

Even if the level of assessments on automobiles were relevant, the Government's argument is fatally defective. It is defective, first, because it is based on gross misconceptions, e.g., that VW is "the only shipper compelled to contribute to the [Mech] fund." (Br. 41) VW is not involved here as a shipper but as one who has chartered vessels and contracts for stevedoring of those vessels. Any other manufacturer, owner or shipper would be in the same position if it chartered vessels and contracted for stevedoring. In fact, the United States Army, another major shipper of automobiles as well as containers contracting for its own stevedore services, accepted the assessments. (R. 105-106, 108-109, 121) Neither VW nor the Army nor anyone else is compelled to contribute to the fund. They pay their chosen stevedore contractor to discharge their cargo and that payment may be expected to cover that contractor's costs and profit.

The argument is defective further because it asks the Court to second-guess the Commission's expert judgment as to reasonableness, and if *Consolo* has any meaning, this contention will not lie here.

Finally, it is defective because it is bottomed on relative terms which lack any comparative bench marks. One is reminded of the answer given by Abraham Lincoln who, when asked how long a man's legs should be, said, "Long enough to reach the floor."

That the amount of the assessment was in excess of MTC's then profit does not establish its unreasonableness. (Br. 37) Nor is unreasonableness established by comparison to the "average increase for packaged general cargo"—all that this proves is that VW has been enjoying extremely low stevedoring costs, i.e., less than one tenth of the average cost per revenue ton of general cargo. (Br. 36-37, R. 482, Ex. 7) VW automobiles are widely advertised in current newspapers and periodicals as selling for something under $2,000. The assessment (assuming it is added on to all other costs and, contrary to the record facts, results in no offsetting benefits and savings) represents slightly over 0.1 percent of the value of a car. The silence of the record respecting any consequent injury to VW speaks eloquently in this connection. How then can the Government say ex cathedra that such a charge "[o]n its face . . . [is] grossly disproportionate and excessive" (Br. 37) and that the judgment of all those who have heretofore considered the matter must be rejected by the Court?

MTC, of course, sought a reduction of the assessment in the interest of reducing the cost of stevedoring the cargo of one of its major customers. This appeal was rejected, and the decision to maintain the level of the automobile assessment has now been upheld by the Examiner, the Commission and the Court of Appeals.

The fact that arguments can be made on both sides does not justify the position taken by the Government here. Considering the situation as a whole—the benefits which have accrued and will continue to accrue to shippers, labor and the industry—it would be wholly unjustified to second-guess the Commission's determination of reasonableness on the basis of the arguments now advanced and imperil all that has been accomplished to date.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Dated at San Francisco, California, October 27, 1967.

Respectfully submitted,

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Appendix A

BRIEF FOR RESPONDENTS

In the United States Court of Appeals
for the District of Columbia Circuit

No. 19,840

Volkswagenwerk Aktiengesellschaft,
Petitioner,

v.

Federal Maritime Commission and
United States of America,
Respondents,

Pacific Maritime Association and
Marine Terminals Corporation,
Intervenors.

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL MARITIME COMMISSION

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May 5, 1966

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[i] QUESTIONS PRESENTED

In the opinion of respondents, the questions presented are as follows:

1. Did the Commission err in determining that no agreement subject to section 15 existed between Marine Terminals Corporation (MTC) and other members of Pacific Maritime Association (PMA) with respect to the assessments referred to on pages 2 and 3 of the Commission Report?

2. Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the prohibitions of section 16 First against making or giving undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or against subjecting any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever?

3. Did the Commission err in determining that MTC, in connection with the assessments referred to above, did not violate the provisions of section 17 requiring the establishment, observance and enforcement of just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property?

4. Did the Commission in its Docket No. 1089 comply with the provisions of section 8 of the Administrative Procedure Act (5 U.S.C. 1007)? In particular, did the Commission make findings upon each of the material issues of law and fact presented and did it rule adequately on petitioner's exceptions to the decision of the Hearing Examiner?

[ii] 5. Do the conclusions of the Commission in the order dismissing petitioner's complaint support its order, and are the conclusions, in turn, supported by adequate findings, substantial evidence in the record and rational bases in the law?

[Subject Index and Tables of Authorities Omitted]

[1] COUNTERSTATEMENT OF THE CASE

Petitioner seeks review under the Review Act of 1950, 5 U.S.C. 1031, *et seq.*, of an order of the Federal Maritime Commission issued in the Commission's Docket No. 1089, *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corporation, et al.*, dismissing petitioner's complaint. The Commission's order was entered October 13, 1965, and the petition to review was filed on December 10, 1965.

Petitioner is a German corporation which manufactures Volkswagen automobiles. Petitioner ships its automobiles to ports on the United States Pacific Coast by means of common carrier and chartered (contract) vessels. During the year 1962, approximately 70 percent of petitioner's shipment of automobiles to the Pacific Coast were shipped on chartered vessels, and the remaining 30 percent were shipped via common carriers (I.D. 3).

Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (hereinafter referred to simply as MTC) were respondents in the Commission proceeding. Marine Terminals Corporation is an intervenor before this Court. MTC operates ocean terminals and performs stevedoring services at San Francisco and Long Beach. The overwhelming portion of MTC's business is performed for common carriers; the remainder for contract carriers (I.D. 4). Both MTC and MTC of Los Angeles are members of carloaders' associations whose agreements have been filed with and approved by the Federal Maritime Commission, pursuant to section 15 of the Shipping Act, 1916.

[2] Pacific Maritime Association (hereinafter simply PMA), an intervenor in the Commission proceeding and before this Court, is a nonprofit corporation organized in 1949 for the purpose of negotiating and administering labor

contracts with labor unions, on behalf of its membership (I.D. 5). Common and contract carriers, marine terminal operators, and stevedore contractors are eligible for membership in PMA; shippers as such are not eligible for membership. Collective bargaining between PMA and the labor unions is subject to the National Labor Relations Act and to the jurisdiction of the National Labor Relations Board, pursuant to 29 U.S.C. 141, *et seq.* Insofar as this case is concerned, collective bargaining takes place between PMA on the one hand and the International Longshoremen's and Warehousemen's Union (hereinafter ILWU) on the other hand, and this bargaining between the two parties deals with the work of longshoremen and marine clerks.

The dues and assessments of PMA are determined by a Board of Directors, the members of which are selected from the membership of PMA as divided into eight groups, each group having an identity of interest. Among the assessments levied by the Board of Directors have been cargo dues which are computed by utilizing (1) "each ton of cargo loaded or discharged at U. S. Pacific Coast ports by or for members or for nonmembers; and (2) the man hours performed by employees of the members under the terms of ILWU agreements." (I.D. 5).

The history of the Commission proceeding goes back to 1957 when negotiations between PMA and the ILWU as to work-saving devices in connection with stevedoring at Pacific Coast ports first took place. At that [3] time PMA desired the opportunity to introduce work-saving devices where appropriate and to be free from strikes and slowdowns. The ILWU wanted assurances from PMA that workers would share in the monetary benefits realized from such work-saving devices, that there would be no acceleration of productivity demanded from individual workers, and

finally that there would be no unsafe conditions created as a result of the introduction of labor-saving devices.

In August of 1959 PMA agreed to accumulate a fund of approximately $1,500,000 for the benefit of its employees, and at the same time the ILWU agreed to a further study of mechanization which would be completed not later than June of 1960. On October 18, 1960, the parties signed a "Memorandum of Agreement on Mechanization and Modernization." This agreement set up a "mechanization and modernization fund" (hereinafter simply "the fund") of $29,000,000, which sum was to be raised over a period of time to extend to July 1, 1966, on which date the agreement would expire. By the terms of the agreement, the members of PMA were to accumulate the $29,000,000 at the rate of $5,000,000 each year with $2,500,000 being collected for the period January 1, to June 30, 1966. Added to that accumulation would be the $1,500,000 already collected by PMA as a result of the August 1959 agreement.

As PMA's membership was responsible for the accumulation of the fund, the ILWU agreed to allow PMA solely to determine how the fund would be accumulated. In January of 1961, the Board of Directors and [4] the membership of PMA approved the adoption of a majority report of a "Work Improvement Fund Committee" which had been appointed by the President of PMA in November of 1960, and at the same time the membership ratified the Memorandum of Agreement entered into between PMA and the ILWU. Except as the facts of this case necessarily include mention of the Memorandum of Agreement, it is not directly involved in this proceeding. No party has attacked the agreement or the purposes thereof. On the contrary, petitioner admits that it supports the purposes of the agreement (Pet. Br. 4).

What is at issue in this proceeding is the method approved by PMA for raising the fund. As stated above, the method was adopted by PMA's membership in January of 1961. The resolution of the meeting reads in part as follows:

> It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued study and be presented to the Membership again in six months.

The Chairman explained the three recommendations which had been made:

1. *Majority Report* (on which the motion is based)
   26¾¢ on general cargo
   5½¢ on bulk
2. *Minority Report*
   10¢ a ton
   12¢ per manhour
3. *Board of Directors*
   20¢ a ton

[5] It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

At this time a secret ballot was taken and the vote was polled as follows:

246 yes; 74 no; 21 withheld; 67 absent

Motion carried by a majority of the total voting strength of the Association membership. (Exh. 20, pp. 3-4).

In essence, the majority report which was adopted by the membership of PMA provided that members would be

assessed on the basis of tonnage carried or handled, with bulk cargo being assessed at one-fifth the rate for general cargo. Shortly after the meeting of PMA's membership, the Board of Directors altered the assessment for general cargo to 27½¢ per ton carried or handled. The assessments were to work as follows: Each member of PMA would remit to PMA as trustee for the fund established pursuant to the agreement between PMA and the ILWU an amount equal to 27½¢ per ton of cargo carried or handled, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement. One thousand board feet of lumber also constituted a ton. These measurements are the ordinary measurements used in manifesting cargo for carriage by sea. The special category of bulk cargo was to be assessed at 5½¢ per ton carried or handled.

PMA further provided that the declarations of tonnage by its members were to be based on and made in "the same manner as" declarations made to PMA for the purposes of assessing dues for the year 1959 (Exh. 2n, p. 3). The declaration form used for dues purposes was to be continued for the purposes of reporting tonnages for fund assessments. [6] At this point the real gravamen of petitioner's complaint becomes apparent. MTC, for dues purposes, had reported the handling of Volkswagen automobiles on a measurement ton basis, in conformity with generally accepted practice. That is, MTC's dues to PMA were assessed on the basis of measurement tons of cargo carried—40 cubic feet of cargo constituting a measurement ton. A Volkswagen automobile on this basis measures 8.7 measurement tons, whereas if weight ton were utilized, it would measure only 0.9 tons (I.D. 13). An assessment for the fund based on measurement tons at 27½¢ per ton equalled $2.35; the same assessment based on weight tons equalled $.25 (I.D. 13).

The assessment formula on automobiles was prescribed by PMA by a letter to its membership dated January 16, 1958, for use in determining tonnage dues. Subsequent to the establishment of the method for determining assessments for the fund, PMA sent out a circular letter to its members stating that it had become apparent that some members were not adhering to the measurement ton formula in reporting automobiles carried or handled:

> Since the institution of the Modernization and Improvement Fund, it has come to our attention a number of contracting stevedores and steamship companies are still reporting automobiles for tonnage dues purposes on a weight basis instead of measurement. The theory of dues and assessments is predicated on the fact member companies shall pay on exactly the same basis thereby assuring all companies each is paying its fair share of a dues or assessment program.
>
> [7] Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form indicating by vessel and date the tonnage on automobiles reported on a weight basis, the tonnage which should have been reported on a measurement basis, and the difference which is assessable at 2½ cents per ton. This statement should be completed as promptly as possible and sent to the Association with a check to cover this amount of additional dues involved. *Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis.* Exh. 36, *emphasis supplied.*

Thus, PMA unequivocally required its members to report automobiles based on measurement tons as opposed to any other method of computation. That the assessment on a Volkswagen automobile based on measurement tons results

in a figure approximately ten times that which would result if weight tons were used cannot be denied, and respondents do not contest petitioner's statement to that effect. In fact, the Commission's Hearing Examiner so found (I.D. 13).

As stated above, petitioner ships a greater percentage of its automobiles which are destined for the Pacific Coast via chartered (contract) vessels rather than by common carriers. In 1962, only about 30 percent were shipped via common carriers. The discharge rate, or charges for handling one of petitioner's automobiles from the ship to the dock, was negotiated between petitioner and MTC, and the resulting figure was called the "unit price." (I.D. 9). As the Examiner found, this price was a combination of actual costs, overhead, and profit, as well as the tonnage dues which MTC was required to remit to PMA. Petitioner knew [8] that the tonnage dues were assessed on its automobiles on the basis of measurement tons, and no protest was made by petitioner as to this method of assessment (I.D. 10). As regards petitioner's automobiles which were carried via common carrier, the stevedoring charges were based on measurement tons and tonnage dues were paid to PMA accordingly.

Thus, a more complete picture of petitioner's cause of complaint and the facts and circumstances surrounding the assessments for the fund emerges. PMA's members had been paying dues to PMA, which dues were assessed on automobiles carried or handled based on the measurement tons of each automobile: MTC paid dues on this basis, or at least there is nothing in the record to indicate that it deviated from that formula, from 1958 until 1961. PMA established the method of assessments for the fund on the same basis as tonnage dues were assessed, at which time petitioner felt aggrieved. Thence ensued the following events during which petitioner attempted to seek relief

from the formula employed by PMA in collecting and making assessments for the fund.

MTC soon realized that it would be unable to absorb the fund assessments on automobiles as a cost of doing business, and it necessarily decided that the assessments would have to be passed on to the shippers, petitioner included. Petitioner protested the method of making fund assessments, although it continued to use MTC's facilities. Petitioner wrote to PMA on January 17, 1961, stating in part:

> [9] In conclusion, we are compelled to request immediate action by the Pacific Maritime Association to remove the threat of tonnage assessment on a measurement basis against the importation of unboxed foreign automobiles. Failing timely and affirmative action by your Association, we shall have no recourse but to seek legal order to remove this overwhelming discrimination which is implicit in an attempted levy at a level 10 to 15 times greater than assessed on other general cargo. Furthermore, you may expect legal action against the Pacific Maritime Association for recovery of damages suffered by Volkswagenwerk, A.G. and the distributors of these autos on the Pacific Coast, resulting from such restraint of trade. (Exh. 7, p. 3).

On March 1, 1961, MTC informed PMA that petitioner was refusing to pay the assessment based as it was on measurement tons. MTC informed PMA that petitioner had informed its agents "that if our rates are renegotiated and the assessment is placed in the rate, they will continue to deduct the 27½¢ per measurement ton." (Exh. 9). At the time petitioner refused to pay the fund assessment, MTC likewise ceased remitting the assessments on petitioner's automobiles to PMA. See Exh. 13 and 14. At that time, however, PMA agreed not to press MTC for payment of the assessments, pending a discussion of various means of legal redress.

Evidence in the record shows that petitioner was the only shipper of automobiles who protested the assessments for the fund (I.D. 19). One common carrier of Volkswagen automobiles, Wallenius Lines, at first paid the assessment but then upon learning that petitioner was refusing to pay the assessments, it likewise refused to pay them. On January 25, 1963, the agents for Wallenius Line informed the California Stevedore & [10] Ballast Co. that it would not pay the assessments on unboxed automobiles, but it guaranteed "that these charges will be paid to you as soon as a determination has been made that these charges are legal." (Exh. 33, p. 2). Companies which were not members of PMA paid assessments at the same rate as members, under the terms of the supplemental agreement (Exh. 1c, p. 8).

The Commission's Hearing Examiner found that, starting about 1961, stevedoring contractors "were able to increase the rate of production of their gang hour. This was attributable to improvements on the Volkswagen vessels that facilitated unloading of the automobiles." (I.D. 20). The Examiner further found that officials of the contractors determined that benefits, such as freedom from strikes or slowdowns, had been derived from the funding plan.

Petitioner's objections to the assessment formula were reiterated on several occasions. See, *e.g.* Exh. 26. On December 12, 1961, the funding committee of PMA met and decided to reject petitioner's proposal that "unboxed autos be assessed on the basis upon which they are normally handled between factory, loading terminal, ship's hold, discharge terminal, distributor, dealer, retail buyer—namely, per unit." (Exh. 26, p. 2). On December 13, 1961, the Board of Directors of PMA met, and the following excerpt is taken from the minutes of that meeting:

> The Chairman read a communication from the Funding Committee covering the problem of collecting funds

from Volkswagen due to the Mechanization Fund. After discussion it was decided that the method of contribution [11] originally established for this type of cargo should be maintained. Marine Terminals requested that a letter covering this discussion be forwarded to them and that they be authorized to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel. Exh. 2h, p. 4.

At various times thereafter the question of instituting legal proceedings to force payment of the assessments was considered. Exh. 29. On March 27, 1962, the Coast Steering Committee of PMA directed that a letter be sent to MTC advising that the "Funding Committee had again reconsidered the Mechanization Fund assessment on unboxed automobiles and did not recommend any change in the present assessment." (Exh. 2f, pp. 5-6). On July 3, 1962, the Board of Directors of PMA approved the recommendation of the Coast Steering Committee that PMA counsel be authorized to institute action against members if the members were in default on their assessments. (Exh. 2f, p. 6). Previously, PMA had advised MTC that legal action should be taken to obtain payment of the assessments from petitioner (Exh. 31). Ultimately, however, it was PMA who on August 14, 1962, instituted suit against MTC in the United States District Court for the Northern District of California to recover the assessments due. MTC, on September 13, 1962, impleaded petitioner, and the District Court on November 29, 1962, stayed proceedings on petitioner's request to enable petitioner to institute proceedings before the Federal Maritime Commission. The follow-

ing issues were to be submitted to the Commission for its determination:

> **[12]** 1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
>
> 2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).
>
> 3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961). (R. 5-6).

On January 29, 1963, petitioner filed its complaint with the Commission. Hearings were held before Examiner Benjamin A. Theeman, a Federal Maritime Commission Hearing Examiner, and on June 5, 1964, the Examiner issued his Initial Decision. The Examiner found, *inter alia*, that MTC were persons subject to the Shipping Act, and that the agreement entered into between MTC and other PMA members was a cooperative working arrangement. The Examiner found that the agreement consisted of two items: (1) the report of the Work Improvement Fund Committee dated January 4, 1961 (Exh. 5a) and (2) the resolution of PMA's membership dated January 10, 1961 (Exh. 2o). The Examiner further found:

> A careful reading of these documents show that they deal solely with "the appropriate method of dividing the costs" of the Mech Fund among the PMA members. Nothing contained in the Committee report or the

minutes of the January 10, 1961 meeting indicates that the Committee or the PMA membership in ratifying the majority report had gone or had intended to go beyond that specified area. ID. 22-23.

[13] The Examiner went on to find, however, that the cooperative working arrangements between MTC and the other members of PMA was not such an arrangement required by section 15 of the Shipping Act, 1916, to be filed with and approved by the Federal Maritime Commission. Thus, the arrangement was not one which fixed or regulated transportation rates or fares; gave or received special rates, accommodations, or other special privileges or advantages; controlled, regulated, prevented, or destroyed competition; pooled or apportioned earnings, losses, or traffic; allotted ports or restricted or otherwise regulated the number and character of sailings between ports; or limited or regulated in any way the volume or character of freight or passenger traffic to be carried. The arrangement, however, did, the Examiner thought, come literally within the seventh category of agreements required by section 15 to be filed; that is, the arrangement did provide for an exclusive, preferential or cooperative working arrangement. The Examiner concluded that the arrangement did not pertain to ocean transportation, and that it was, therefore, not within the purview of the Shipping Act.

Additionally, the Examiner found it unnecessary to determine whether the cooperative working arrangement was part of a collective bargaining agreement or whether the arrangement violated the antitrust laws. I.D. 33-34. The Examiner also found no violations of sections 16 and 17 of the Shipping Act.

After exceptions and oral argument, the Commission issued a report on October 13, 1965. The majority of the

Commission affirmed the [14] Examiner's finding that the arrangement between MTC and other members of PMA was not subject to the Shipping Act, 1916, even assuming "all of the members of PMA are 'other persons' within the meaning of the Shipping Act, 1916, . . ." (R. 7). The Commission found that the agreement among the membership of PMA establishing the method of assessing for the collection of the fund "does not fall within the confines of section 15 as standing by itself, it has no legal impact upon outsiders." The Commission further found that an additional agreement among the membership of PMA to pass on all or part of the assessments for the fund to carriers or shippers had not been established. R. 8-9.

In finding no additional agreement, the Commission stated:

> The record is devoid of evidence showing the existence of such an additional agreement. The record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment. R. 9.

The majority of the Commission found itself in agreement with the Examiner that there were no violations of sections 16 and 17 of the Shipping Act. Commissioner Patterson dissented from the majority report in all respects; Commissioner Hearn agreed with the majority that there were no violations of sections 16 and 17 of the Shipping Act, but he disagreed with the majority on the issue of whether there was an agreement subject [15] to section 15. He would

have required PMA to file its cooperative working arrangement with the Commission and seek approval.

Petitioner thereupon filed its petition to review within the sixty-day period prescribed by the Review Act of 1950, and PMA and MTC were granted leave to intervene.

SUMMARY OF ARGUMENT

The agreement among the members of the Pacific Maritime Association (PMA) establishing the mechanization and modernization fund and providing for assessments for the fund from members on the same basis as members were assessed for PMA dues was a cooperative working arrangement, but the agreement was not one required by section 15 of the Shipping Act, 1916, to be filed with and approved by the Commission. As the agreement did not affect the competitive relationships of the PMA members and did not pertain to ocean transportation, the legislative history of section 15 of the Shipping Act and a construction of like provisions of the Interstate Commerce Act leads to the conclusion that the agreement is not within the purview of the Shipping Act.

The Commission correctly found that Marine Terminals Corporation (MTC) did not violate section 16 of the Shipping Act, 1916, by discriminating against petitioner's automobiles. In view of past Commission precedent that a competitive relationship between shippers must be shown to sustain an allegation of a violation of section 16 and petitioner could **[16]** not make such a showing as there was no other cargo classification in competition with automobiles, petitioner's allegation could not stand.

Finally, the Commission correctly found that MTC did not violate section 17 of the Shipping Act, 1916, by its use of the measurement ton rather than the weight ton for

making assessments on automobiles. Since MTC had taken all reasonable steps to have the assessment altered and had even offered to absorb some of the assessment, the Commission's finding that the inclusion of the assessment by MTC in its charges to petitioner was a reasonable business practice was, under the circumstances, proper.

ARGUMENT

I. The Commission Correctly Found That the Agreement for Raising the Mech Fund Was Not Subject to Section 15 of the Shipping Act, 1916.

The Commission found that the agreement among the members of PMA for raising the fund was not subject to section 15 of the Shipping Act, 1916, even though that agreement could be termed a "cooperative working arrangement" within the meaning of the statute. Even if section 15 could literally encompass any such arrangement, the Commission found,

> the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives. *D. J. Roach Inc. v. Albany Port District et al.*, 5 F.M.B. 333, 335. (R. 7, footnote omitted).

[17] In other words, the Commission said, the arrangement among the members of PMA was not among "the type of agreements which affect competition by the parties in vying to serve outsiders . . . ." (*Ibid.*)

An examination of the legislative history bears out the Commission's finding. The Alexander Committee Report of 1914 treated only those

> written agreements, conference arrangements or gentlemen's understandings, which have for their principal purpose the regulation of competition through either (1) the fixing or regulating of rates, (2) the apportionment of traffic by alloting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade,* H.R. Doc. 805, 63rd Cong., 2d Sess., 415 (1914).

It is clear that the agreement among the members of PMA does not come within the Alexander Committee's definition of those agreements which were to be regulated or prohibited.

The Examiner found that some limitation must be imposed on the requirements for filing agreements with the Commission:

> It would be idle conjecture to imagine what might be filed with the Commission, if the requirement in section 15 that every agreement between common carriers and other persons subject to the act providing for a cooperative working arrangement were taken literally. (I.D. 29).

This is certainly not to say that the Commission has been loath to find agreements subject to the statute where the facts of a given case put them squarely within the intent of section 15. But, the Commission has [18] realized that limitations are inherent in a sensible reading of the statute.

In 1927, the U. S. Shipping Board, one of the Commission's predecessor agencies, limited the language of section 15 as follows:

> As contended by conference representatives in this proceeding, a too literal interpretation of the word

"every" to include routine actions between the carriers under conference agreements would result in delays and inconvenience to both carriers and shippers. *Ex Parte 4, Section 15 Inquiry,* 1 U.S.S.B. 121, at 125 (1927).

The Commission and its predecessors have elaborated on what constitutes a section 15 agreement. In *Mitsui Steamship Co. v. Anglo Canadian Shipping Co.,* 5 F.M.B. 74 (1956), the Federal Maritime Board found that a "new conference interpretation" was subject to the filing and approval requirements of section 15. In *Associated-Banning Co., et al. v. Matson Nav. Co., et al.,* 5 F.M.B. 336 (1957), the Board held that an agreement evidencing a general intent to enter into certain arrangements was not a complete agreement under the Act.

In 1963, the Commission in *Pacific Coast Port Equalization Rule,* 7 F.M.C. 623, *aff'd sub nom. American Export & Isbrandtsen L. v. Federal Maritime Com'n,* 334 F.2d 185 (9th Cir. 1964), found that a rule providing for port equalization was a new arrangement, not sanctioned by an approved agreement, which was required to be filed with and approved by the Commission. And, finally, in its Docket No. 872, *Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* July 28, 1965, the Commission found [19] that rate-making procedures not fairly embraced within an approved agreement required separate approval pursuant to section 15. Thus, the Commission has not been slow to make findings that certain types of agreements are subject to section 15 and are required to be filed with the Commission.

The courts have construed the provisions of the Shipping Act, 1916, in the light of the provisions of the Interstate

Commerce Act, upon which the Shipping Act was closely modeled. See *U.S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). Section 15 of the Shipping Act parallels Section 5(1) of the Interstate Commerce Act, and the traditional interpretation of Section 5(1) of the Interstate Commerce Act is that it does not encompass agreements affecting labor-management relationships except where the competitive relationships of the parties are affected. In *Kennedy v. Long Island Rail Road Company*, 319 F.2d 366 (1963), the Second Circuit held that a strike insurance plan did not violate proscriptions of the Interstate Commerce Act:

> These assertions must also fail, for the fundamental reason that the named statutes [the Sherman Act and the Interstate Commerce Act] were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations. 319 F.2d 366, at 372-3.

In commenting on the pooling characteristics of the strike insurance plan in the *Kennedy* case, the Second Circuit went on to state:

> **[20]** It may be true that the collection of premiums and payment of proceeds to a struck railroad might be viewed literally as the "division * * * of gross or net earnings," since contributions to the insurance fund were from the passenger and freight revenues of the participating roads. But so too are their contributions to the A.A.R., a trade association . . . whose expenses are met by assessments from its members in proportion to their operating revenues; but we do not understand the appellants to contend that the mere existence of the A.A.R., or of any other trade association in the transportation field, runs afoul of the anti-pooling pro-

> vision of the Interstate Commerce Act and also, incidentally, of the Sherman Act. Similarly here, the strike insurance plan does not represent an attempt to apportion business among competing railroads on a basis other than individual performance. Its validity under the Interstate Commerce Act § 5(1) can thus hardly be doubted. 319 F.2d 366, at 374 (footnotes omitted).

In the instant case, the Commission found that the mech fund agreement did not affect the competitive relationships among the PMA members, as there was no agreement among the members to pass on all or a part of the fund assessments. The decision of whether to absorb or pass on the assessments was left to each individual member, and no concerted action was taken to determine the course the members would take. The Commission explicitly found that there was a divergence of opinion among the members as to whether the assessments would be absorbed or passed on (R. 9).

The Commission's interpretation in these circumstances was a reasonable one, and even though it may not have been the only reasonable one that could have been reached, it should be upheld especially where, as here, it is supported by the legislative history and a similar construction of like provisions of the Interstate Commerce Act. As this Court [21] recently said in *Philadelphia Television Broadcasting Co. v. Federal Communications Commission,* decided March 28, 1966 (No. 19,577):

> In approaching the problem of statutory interpretation before us, we show "great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable

one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " Slip Opinion, pp. 2-3 (footnote omitted).

II. The Commission Correctly Found No Violation of Section 16 of the Shipping Act, 1916.

Petitioner alleges that its automobiles are discriminated against and "logs, lumber, bulk cargo, scrap metal, in fact, all other general cargo, are preferred" (Pets. Br. 40), in violation of section 16 of the Shipping Act, 1916. That section makes it unlawful for any common carrier or other person subject to the Act

> . . . To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Petitioner admitted in its Brief to the Examiner that previous decisions of the Commission held section 16 inapplicable in a case such as the instant one. See, *e.g., Huber Mfg. Co. v. N. V. Stoomvaart Maatschappij "Nederland,"* 4 F.M.B. 343 (1953); *The Paraffine Co.'s, Inc. v. Amer.-Hawaiian S.S. Co., et al.,* 1 U.S.M.C. 628 (1936); *Johnson Pickett Rope* [22] *Co. v. Dollar S.S. Lines et al.,* 1 U.S.S.B.B. 585 (1936). In those cases the Commission's predecessors held that section 16 was applicable only in situations concerning similarly situated shippers or ports. The Examiner found that there was "no other cargo classification in competition with automobiles" and he, therefore, rejected petitioner's allegation of a violation of section 16 (I.D. 35). The Commission affirmed (R. 9).

Petitioner now reiterates its argument based wholly on the Government's Brief in the case of *New York Foreign Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 337 F.2d 289 (2nd Cir. 1964), *cert. den.* 380 U.S. 914 (1965). In that case the Commission was defending a rule which required full disclosure to shippers of insurance costs of the freight forwarders, a rule which was the culmination of many years of Congressional and agency hearings. The Court of Appeals affirmed the rule. In promulgating the rule the Commission found it unnecessary to make a finding of a competitive relationship as a basis for holding the disadvantage in that case unreasonable, because of the peculiar nature of the industry (freight forwarding) that it was regulating. Arguments that such a finding was necessary were urged on the Second Circuit, which rejected them:

> Transportation or wharfage charges are dependent upon the particular commodity involved; the cost for shipping or storing bananas, for example, bears no relation to the fees levied for heavy industrial equipment. To find an unlawful discrimination in transportation charges thus quite properly requires a showing of competitive relationship between two shippers who are charged different **[23]** prices. But forwarders render substantially the same service to all shippers in procuring insurance or arranging cartage; the commodity being shipped has little or nothing to do with the reasonableness of the fee exacted for the forwarder's service. The very practice of charging shippers disguised mark-ups of widely varying amounts on substantially identical services, without justification, seems to us to be prima facie discriminatory in a regulated industry. In any event, we do not believe competitive relationships must be shown to justify the prophylactic disclosure technique of Rule 510.23(j). 337 F.2d at 299-300.

In the instant case, the assessments bear a direct relationship to the type of cargo carried or handled, and thus a competitive relationship must be shown. Both the Examiner and the Commission, we submit, correctly found no violation of section 16.

III. The Commission Correctly Found No Violation of Section 17 of the Shipping Act, 1916.

Petitioner alleges that the use of the measurement ton rather than the weight ton for making assessments for the fund constitutes an "unreasonable practice * * * relating to * * * the handling of property" in violation of section 17 of the Shipping Act, 1916. If the assessment were made on a weight ton basis, petitioner's grievance would probably be eliminated (R. 10). Both the Examiner and the Commission found no violation of section 17 in the manner of making assessments for the fund. The Examiner found no evidence that "charges attributable to the handling of other cargo are attempted to be collected by Respondents from Volkswagen" (I.D. 37) and that it appeared that the inclusion of the assessment by MTC in their charges to petitioner was only a matter of "business expediency." (*Id.*). The Examiner therefore concluded that there was "insufficient evidence * * * to establish that this practice was either unjust or unreasonable." (*Id.*).

[24] Petitioner's admission that there is no requirement that all users of a facility be equally assessed, the Commission thought, was fatal to its section 17 allegation (R. 10). The Commission concluded that as long as "substantial benefits" accrue to one against whom a charge is levied, the charge would not be declared unlawful. See *Evans Cooperage Co., Inc. v. Board of Commissioners,* 6 F.M.B. 415 (1961).

In the context of the allegation of a section 17 violation, it must be kept in mind that petitioner is charging MTC

and not PMA with the violation. And, it is PMA's membership that made the decision as to how the assessments for the fund were to be made, and more particularly, that assessments on automobiles were to be made on the basis of "measurement ton." Therefore, MTC is paying assessments to PMA as PMA's membership has directed. The fact that it is passing them on to petitioner is a decision that it has reached by itself. The Commission recognized that MTC's activities were reasonable because "they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest." (R. 10-11).

The Examiner recognized the necessity for focusing only on the relationship between petitioner and MTC:

> As stated above, neither PMA nor the agreement between and among PMA members has been found subject to the Act. For that reason we do not comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA [25] or the aims and purposes of that agreement. Volkswagen is complaining about Respondents practice of including the Mech fund assessment in its stevedoring rate. *This discussion concerning Section 17, therefore, deals with the relationship between Respondents /MTC/ and Volkswagen.* (I.D. 35, *emphasis supplied*).

The Examiner went on to find that there was no evidence that the inclusion of the assessments increased MTC's profits or that MTC's profits were unreasonable. He concluded that the inclusion of the assessment represented an operating expense, and that MTC had taken all reasonable steps available to assist petitioner in order to have the assessment changed by PMA. Those efforts having failed,

MTC was not guilty of a violation of section 17 by continuing to include the assessment in its charge to petitioner.

Respondents submit that this is an area where the expertise of the agency is entitled to its greatest weight. Both the Commission and the Examiner examined all the pertinent facts and found that MTC's conduct did not violate section 17. That finding should be affirmed.

CONCLUSION

The Report and Order of the Federal Maritime Commission here under review should be affirmed.

Respectfully submitted.

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Appendix B

Sales of Volkswagen Automobiles in the United States, 1949-1966 (excluding trucks)

Year	Units	% Import Market
1949	2	
1950	157	0.9
1951	390	1.9
1952	601	2.0
1953	980	3.4
1954	6,343	19.5
1955	28,907	49.4
1956	50,011	50.9
1957	64,242	31.1
1958	78,588	20.8
1959	120,442	19.6
1960	159,995	32.1
1961	177,308	46.8
1962	192,570	56.8
1963	240,143	62.3
1964	307,173	63.4
1965	383,978	67.4
1966	420,018	63.8

Source: Ward's 1967 Automotive Yearbook, 29th Ed., p. 170, Ward's 1965 Automotive Yearbook, 27th Ed., p. 178.

New Car Registrations in the United States, 1960-1966

Year	Total All Makes	VW
1960	6,576,650	159,995
1961	5,854,747	177,308
1962	6,938,863	192,570
1963	7,556,717	240,143
1964	8,065,150	307,173
1965	9,313,912	383,978
1966 (1st half)	4,212,720	203,121

Source: Automotive News, 1962 Almanac, pp. 37, 41; 1964 Almanac, pp. 14, 34; 1965 Almanac, p. 94; 1966 Almanac, p. 8; Automotive News, August 14, 1967, p. 1.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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Not one of the four answering briefs * defends the results reached by the Federal Martime Commission on the grounds given by that agency. Nor are these briefs con-

* In referring to the various briefs before this Court the following abbreviated titles are used: "VW Br." (Brief for Petitioner); "US Br." (Brief for the United States); "FMC Br." (Brief for the Federal Maritime Commission); "PMA Br." (Brief for Pacific Maritime Association, Intervenor); "MTC Br." (Brief for Intervenor Maritime Terminals Corporation); "ILWU Br." (Brief on Behalf of International Longshoremen's and Warehousemen's Union as Amicus Curiae in Support of Judgment Below). The same abbreviations are used as in our main brief.

cerned with traditional guides to statutory construction. They urge this Court, regardless of the merits of VW's position, "even if the words of the Shipping Act should be held unambiguously to embrace the formula devised by PMA" (ILWU Br. 8), to refrain from taking any action which "would lead" the "union * * * to resort to economic self-help to obtain a new and 'lawful' contract" (ILWU Br. 2). Waterfront harmony dictates, they say, that nothing be done to bridle PMA's arbitrary and selfish rule.

Apart from dealing with the factual inaccuracies which stud our opponents' briefs, this reply is confined to the sole legal point in the answering briefs not covered in our main brief and to which we now turn.

I

The cooperative working arrangement here involved is not excluded from section 15 because of its tenuous connection with collective bargaining.

A

The Commission's disposition of this contention adversely to PMA should not be upset.

Both PMA and the ILWU strenuously urge that because the Fund has its origin in an agreement with ILWU, the cooperative working arrangement by which PMA allocates its cost is excused from compliance with section 15 (PMA Br. 21-32; ILWU Br. 8-18).

At the very outset it is important to point out that this is not a new contention in this proceeding. On the contrary, precisely this argument was made to the Hearing Examiner, who emphatically rejected it (R. 649-650). He found no merit in PMA's claim "that the Commission does not have jurisdiction of the agreement establishing the

method of collecting the Mech Fund because it is a part of a collective bargaining agreement" (R. 649). Before the Commission PMA renewed its argument that "Congress did not intend section 15 to apply to agreements among members of a bargaining association implementing labor contracts" [Intervener's Answering Brief in Support of Initial Decision of Examiner, 10-14]. The Commission's conclusion, however, that PMA's plan is not under section 15 proceeds on a wholly different ground and makes clear that the plan would have been considered to be covered if it had included "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675).

Thus, if the terms of PMA's arrangement had been somewhat different, the Commission would have taken jurisdiction even though it would still have been an arrangement implementing a collective bargaining agreement. In short, the Commission agreed with the Examiner that "To make a determination that the Agreement is either within or without section 15, the Commission looks to the standards set forth in Section 15. The fact that the agreement (or the parties) may also come within the scope of another statute does not deprive this Commission of jurisdiction" (R. 650) (footnotes omitted).

Accordingly, the contention which PMA and the ILWU urge before this Court is one which the Commission has rejected, and such rejection should be respected as rational, and neither arbitrary nor capricious.

B

PMA's plan forms no part of any collective bargaining agreement.

The fact is that PMA's cooperative working arrangement is not a collective bargaining agreement and does not concern labor-management relations. The arrangement is

solely PMA's; PMA alone decided how the Fund should be raised. Moreover, what influenced PMA in adopting the method of allocation which it did, was the fact that this method best avoided the "danger of being taken over some day by the Union" (R. 472). Under this method the danger was felt to be minimal because

> "the formula the Committee is proposing is an internal one, not one agreed to with the Union, and, even more important, is one that raises an agreed sum of money for an agreed period of time. If any additional fund is to be raised after the conclusion of this agreement, both the amount and the duration of that arrangement will have to be negotiated. The fact that the present Fund would be raised internally by PMA on a tonnage basis is not felt by the majority of the Committee to be a sufficiently influential or dangerous precedent for such future bargaining as to warrant its abandonment" (R. 471).

Yet, in the face of PMA's studied care to shut out the ILWU from playing any role now or in the future in determining how the cost of the Fund should be distributed throughout the industry, both PMA and the Union now invoke the alleged immunity of collective bargaining from outside interference to shroud from inspection the "internal" method devised by PMA. The short answer is that PMA and the ILWU, by their own agreement, have cut themselves off from contending that PMA's cooperative working arrangement is part of a labor agreement or the product of collective bargaining.

No one has suggested that the collective bargaining agreement giving rise to the Mech Fund is a section 15 agreement. Therefore, PMA indulges in pure hyperbole in suggesting that decision of this case in petitioner's favor will mean "that the members of the maritime industry cannot negotiate industry-wide labor contracts which result in new cost items without first obtaining Section 15 approval from the Maritime Commission" (PMA Br. 22) or

that it will require the filing with the Commission of virtually every labor agreement (PMA Br. 30-31). These issues are not raised here and need not be anticipated. Thus, as the Solicitor General points out, PMA's agreement would not be removed from section 15 even if it is assumed, for purposes of deciding this case, "that agreements which relate solely to collective bargaining or labor relations are excepted" (US Br. 31).

C

Industry regulation and collective bargaining are not incompatible.

If the Court, however, were faced with the necessity of reconciling the obligations of the members of PMA as employers, on the one hand, and as regulated carriers and other persons, on the other hand, it would have to conclude that PMA's membership must satisfy both. There is no inconsistency between recognition that exclusive jurisdiction lies in the National Labor Relations Board over collective bargaining in the shipping industry and jurisdiction in the Commission over other aspects of that industry. "Businesses are frequently subject to regulation by several government agencies." *Greater Baton Rouge Port Comm'n* v. *United States,* 287 F. 2d 86, 92 (5th Cir. 1961), *cert. denied,* 368 U.S. 985 (1962). In this connection it should be noted that section 6 of the Clayton Act, 15 U.S.C., section 17, carving out a specific labor exemption from the antitrust laws has no parallel in the Shipping Act.

There are no policy reasons for excluding agreements between maritime companies from surveillance simply because such agreements are ostensibly entered into in the capacity of these companies as employers. The Civil Aeronautics Board, administering a statute derived from section 15, has held that the establishment of an employer collective bargaining association of carriers was a "cooperative working arrangement" and required filing and approval under section 412 of the 1938 Civil Aeronautics Act, now section

412 of the 1958 Federal Aviation Act (49 U.S.C., section 1382), which corresponds to section 15 of the Shipping Act, 1916. *Airlines Negotiating Conference Agreements,* 8 C.A.B. 354 (1947).

Our opponents have attempted to distinguish the decisions of the Civil Aeronautics Board on the ground that this agency is directed "to promote the policies of the Railway Labor Act" (PMA Br. 28, n. 29). But this distinction does not hold water. Despite substantial differences, the Railway Labor Act and the National Labor Relations Act have much in common, particularly the primary purpose of fostering the solution of labor disputes through collective bargaining. Thus, if the Civil Aeronautics Board had a special mandate to promote the purposes of the applicable labor legislation, and if there were a "national policy" against all interference by regulatory agencies with matters related to collective bargaining, the Civil Aeronautics Board would have had more reason, not less, than the Commission, to refrain from exercising control in this area.

A proceeding, the precise converse of this one, constitutes persuasive authority against PMA. *New York Lumber Trade Ass'n* v. *Lacey,* 245 App. Div. 262 (2d Dep't 1935), *aff'd,* 269 N.Y. 595 (1935), *remittitur amended,* 269 N.Y. 677 (1935), *cert. denied,* 298 U.S. 684 (1936). In that case, out of deference to the primary jurisdiction created by the Shipping Act, the courts of New York dismissed a complaint seeking relief from the refusal of steamship lines to accept or deliver freight unless the delivery trucks were manned by members of a particular union. The steamship lines had imposed the requirement for fear of a strike by their employees. Thus, the condition imposed, unlike the PMA tax levied to raise the Fund, was specifically in response to a labor demand. Nevertheless, the New York courts held that the action of the carriers was a practice squarely within the jurisdiction of the Commission's predecessor—a jurisdiction which acceptance of PMA's argument would end.

D

Collective bargaining agreements are not above the law.

The premise underlying our opponents' thesis is that any matter which is an appropriate subject for collective bargaining necessarily lies outside the jurisdiction of the Commission. Because distribution of the cost of the Mech Fund would have been a proper subject for collective bargaining and because, as a result of collective bargaining, it was agreed that the Union would have no share in how such cost is distributed, they would deny any power in the Commission to review the method through which PMA is, in fact, collecting five million dollars a year from our foreign and interstate commerce (ILWU Br. 12-18; PMA Br. 21-22).

But neither labor nor agreements to which labor is a party are above the law. The fact that the substantive content of collective bargaining agreements is left in part unregulated by federal labor relations legislation (29 U.S.C., sections 141 *et seq.*) does not mean that such agreements need not conform to the prohibitions or requirements of other federal statutes.

> "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

As this Court observed in *Pennington*:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. * * * In such a case the restraint on the product mar-

> ket is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663.

Where a union combines with management to restrain competition, it risks losing its own exemption from the antitrust laws, rather than extending such exemption to the other. "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460, 464 (1949).

In pointing out that collective bargaining agreements could contravene the antitrust laws, Mr. Justice Black, in *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797, 809-811 (1945), used language requiring only slight paraphrasing to be equally appropriate here:

> "It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective.
>
> * * *
>
> A business monopoly is no less such because a union participates, and such participation is a violation of the Act."

Congress has not bestowed upon unions complete and unreviewable authority to aid shipping groups in frustrating Congress' announced objectives under the Shipping Act, *i.e.*, bringing these groups under government supervision and control and preventing discrimination among

shippers. A section 15 agreement is no less such even if a union participates—which ILWU did not.

Our opponents assume that if there is a conflict between the obligation to bargain collectively and the obligation to submit collective action to the Commission for review, it is the latter which must yield. This assumption is unfounded. If the antitrust laws, which include a special statutory exemption, remain applicable, *a fortiori,* so does their statutory counterpart, the Shipping Act.

E

Not the antitrust laws but the Shipping Act deals with anti-competitive conduct in the shipping industry.

Our opponents suggest that the antitrust laws provide the appropriate remedy for VW's grievances (PMA Br. 32-35; MTC Br. 5; FMC Br. 17-19). Section 15 should be narrowly construed, they contend, in obedience to the principle that immunity from the antitrust laws is not lightly to be implied. But the reason underlying the rule that anti-competitive conduct should not go unchecked requires, on the contrary, an expansive reading of that section.

No reasons are given by our adversaries for preferring the proscriptions of the antitrust laws to regulation under the Shipping Act. Nor do they endeavor to explain why the objections urged against regulation by the Commission would not apply with even greater force to the assertion of antitrust jurisdiction by the courts. Certainly, there would be the same alleged interference with the processes of collective bargaining, the same supposed peril to the underlying agreement and a far longer period of uncertainty regarding the whole arrangement. True, they suggest that in the courts unions can be joined as parties, but even they would not contend that the ILWU can be taxed with what PMA has done alone.

Undoubtedly, what explains the preference for the alternative method of controlling anti-competitive conduct is

that this would mean continued long and expensive litigation for VW, during which all the pressures which PMA and its allies have available (and of which significant hints are given in the briefs before the Court) can be brought to bear upon VW to compel it to desist. Clearly, here the expectation is that justice delayed will be justice denied. If the issue before the Court were liability of PMA's program under the antitrust laws, indubitably the exclusive jurisdiction of the Shipping Act would be urged with the same vigor as it is now denied.

II

Discrimination gains no sanctity by repetition.

Our opponents place great weight on the claim that the distribution of the cost of the Mech Fund was patterned on PMA's dues collections (PMA Br. 20, 40-42; FMC Br. 6, 20). Even if this were true, it would be irrelevant. What PMA did in the past may be as improper as what it is doing now. But, in fact, the entire argument is a tissue of half-truths and irrelevancies.

In essence, the contention is that the Mech Fund follows PMA's dues practices which, in turn, are based on ocean freight, and that such freight in the case of automobiles is determined by measurement tons.

Assuming *arguendo* that ocean freight is so determined, how does that justify use of the same yardstick for the wholly different purpose of stevedoring and terminal operations? Significantly, PMA's dues do not take over the ocean freight yardstick intact. When the Mech Fund was voted, these dues were predicated on a combination of tonnage and man-hours, not on tonnage alone (R. 473). Man-hours accounted for approximately sixty per cent of PMA's dues and tonnage forty per cent (*ibid.*). Had the Mech Fund collections actually copied the dues assessments,

it is this formula that would have been employed, as a minority of PMA's committee recommended (R. 475-79), with very different results for petitioner and its cargo.

Furthermore, so far as petitioner's cargo is concerned, even the forty per cent of PMA's dues paid on tonnage was calculated on the basis of weight or unit by all the stevedores discharging its automobiles, except MTC. This is established by uncontroverted testimony of PMA's own vice-president. He testified that at the time the Mech Fund was voted every one of the stevedores unloading Volkswagen vehicles were paying dues on the basis of weight, not measurement (R. 84-85, 169-70).* Contemporaneous documentary evidence from PMA's own files show that dues on the Volkswagen automobiles carried by the Wallenius Lines also were paid on the basis of "one (1) unit, and/or one (1) ton" (R. 494).

Although PMA's vice-president named MTC as one of the companies reporting on the basis of weight, when MTC's vice-president in turn took the stand he claimed his company had always paid dues on the basis of measurement tons and, led by PMA's counsel, agreed somewhat hesitantly that VW was aware of this charge (R. 160-61). The charge in question amounted to 2½ cents per ton (R. 524), which on a measurement basis would mean a tax of twenty-five cents per vehicle. The Examiner found: "Admittedly, Volkswagen was aware that the tonnage dues item was included in the rate; that for automobiles the amount of the assessment was computed on a measurement ton

* According to PMA's vice-president, corrected reports were demanded and "many" were received (R. 80-86), but when VW sought to probe this answer and asked for PMA's records, production was avoided on the ground of burdensomeness (R. 86). But even if such corrected reports were filed, the fact remains that until the Mech Fund was voted PMA's dues were being paid on VW's cargo, by everyone but MTC, on the basis of weight, not measurement.

basis; and that Respondents paid tonnage dues to PMA on that basis" (R. 621).*

Taking this finding at its face value and assuming that VW knew that MTC was paying PMA dues amounting to 2½ cents per measurement ton and made no protest, how does that prove that what PMA was doing was right then or is right now? Certainly, no conclusions favorable to PMA or adverse to VW can be drawn from VW's failure to take on PMA as an adversary over a comparatively modest charge, paid by only two of the stevedores discharging its cargo. Obviously, the course of wisdom was to pay the 2½ cents.

It should not be overlooked that there are significant differences between PMA's dues and the Mech Fund collections in addition to the inclusion in the former of a sixty per cent labor factor. Among other things, PMA's dues do not favor scrap metal and coastwise lumber.

But in any event, the issue here is not the legality of PMA's dues nor what PMA has been able to get away with unchallenged in the past, but what restrictions the Shipping Act places on its present conduct. In no way is resolution of that issue aided by insistence upon the purported identity of the Mech Fund assessments with earlier exactions, the legal status of which is entirely obscure.

III

The claim that the record is deficient regarding the impact of the Mech Fund assessment on VW's costs is footless.

Our opponents lay great stress on the asserted failure of VW to establish what the costs of discharging its cargo

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*In PMA's brief this finding now serves as a basis for such rhetorical flourishes as "Volkswagen fully appreciated and did not complain that PMA's tonnage dues were historically computed on the basis of measurement" (PMA Br. 40).

were before and after the Mech Fund (PMA Br. 9, 16-17; MTC Br. 12-13; FMC Br. 31). MTC also seize on an ambiguous finding by the Examiner (R. 627) to claim that the commodity rate VW paid per car after the Mech Fund assessment went into effect was less than the amount paid prior to the assessment (MTC Br. 7-8; FMC Br. 7). The inference is that despite the assessment VW is paying less to discharge its cars than it did before and, therefore, is suffering no hardship.

A contemporaneous letter written by MTC's counsel and forming part of the record establishes beyond peradventure that the evidence on which the Examiner based his finding, testimony by MTC's vice-president that the commodity rate to VW for discharging its cars decreased after the Mech Fund went into effect (R. 155, 162), necessarily referred to the rate exclusive of the assessment. Recounting in December 1962 what had taken place after the assessment was voted in January 1961, MTC's counsel wrote:

> "Volkswagenwerk refused to pay the assessment on this basis, whether billed as part of the basic stevedoring charge or billed separately. It specifically refused to agree to a new commodity rate which would include the assessment. Its position was that if stevedoring services were billed on a commodity rate basis, the amount of the assessment would be deducted and only the balance paid. Because of Volkswagenwerk's adamant position, Marine Terminals has continued to bill the Mechanization Fund assessments separately. Volkswagenwerk has continued to refuse payment of these assessments" (R. 520).

VW has never contended that the Mech Fund assessment increased its costs by the full amount of the assess-

ment.* Obviously some compensating benefits were received, but as the Commission found after this issue had been extensively explored on the record, these were no greater than what other cargo stood to gain (R. 677). Our opponents are simply attempting to reopen this concluded point.

But if there were any deficiency in the record it would not avail our opponents since it is they who are responsible for it. When VW sought to establish exactly the facts which they now criticize the record for lacking, MTC's counsel, with PMA's acquiescence, blocked the inquiry.**

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* Our main brief makes exactly the point which our opponents imply we are suppressing, which is that "in negotiating a new [commodity] rate" the fact that "the PMA assessment would necessarily be included did not mean that the new rate would be the old rate plus the PMA assessment" (VW Br. 47).

** After VW's counsel had established through MTC's vice-president what MTC's commodity rate had been prior to the Mech Fund, he sought to develop what MTC was charging currently with the Mech Fund in effect. At this point counsel for MTC vigorously objected:

> "Mr. Zimmerman: Now, I would like to interpose an objection to any further questioning along this line. As I understand, the purpose of this testimony was simply to establish that it was necessary for Marine Terminals to reflect these assessments in its commodity rate, so that ultimately they would be paid by Volkswagen.
>
> I don't believe that there is any question that that is so.
>
> Mr. Horsman has testified that these costs must be reflected because they operate on a cost-plus basis. Now, what the actual amounts are I believe is irrelevant. The costs and commodity rates in the stevedoring industry are highly confidential.
>
> Unless there is some compelling reason for getting those figures on the record, I would object to any further questions along this line.
>
> Mr. Madden: Well, one of the fundamental complaints set forth in this proceeding on the part of Volkswagen is the percentage increase in the cost of discharging Volkswagens, which inevitably results from the imposition of this assessment charge

Finally, our opponents misapprehend upon whom the burden of proof lies regarding the benefits to VW from the Mech Fund. The relationship between benefits and burdens is relevant only to the issue raised under sections 16 and 17 in that it may justify otherwise *prima facie* discrimination. Therefore, not petitioner but our opponents had the burden of proving that the higher charge against automobiles was justified by greater than average labor savings, which, as the Commission found (R. 677), is not the fact. If they failed to discharge that burden, it is because, as they well know, the facts were otherwise.

IV

Our opponents' briefs present a misleading picture of the record.

Because it would be impossible within a brief of any reasonable length to expose each and every half-truth and specious contention to be found in our opponents' briefs, we have culled just a few from each.

A

Brief for the Federal Maritime Commission

(1)

"No other shipper of automobiles protested the method of assessment (R. 633) although one common carrier of VW's, Wallenius Lines, refused to pay

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on top of the pre-existing charges, and if we don't have the pre-existing charges there is no real basis for us to show what the percentage of increase is in this proceeding.

Mr. Zimmerman: You have on the record a statement of what the costs were at the beginning of the mechanization fund. In the absence of any evidence to the contrary, that gives you your percentage. I don't know as it is necessary to go into details of later costs" (R. 141).

its assessments upon learning in 1963 of Volkswagen's action (R. 632, fn. 20)'' (FMC Br. 8).

The inference which the Court is invited to draw is that petitioner's grievances cannot have much substance since it was the only shipper of automobiles to protest the PMA assessment. This statement is a half-truth and the inference which the Court is invited to draw therefrom is wholly false.

There is no evidence that any other commercial shipper of automobiles uses chartered vessels. On automobiles transported by common carrier, the assessment, like all stevedoring charges, is paid by the vessel. The shipper pays freight only. When the hearing was held herein, steamship freight rates on automobiles had not increased (R. 633). The Army, however, which like petitioner pays its own stevedoring costs, did complain of the use of measurement tons for the Mech Fund assessments and, in fact, refused for some period of time to pay such assessments on its vehicles (R. 518, 489, 357). In addition, the Hanseatic Vaasa Line, a non-PMA member, a carrier and MTC's largest automobile account after petitioner, likewise protested the assessment (R. 238-239).

Thus, the truth is that petitioner, far from being alone and unique in finding PMA's plan unfair to automobiles, was joined by the United States Army and by the carrier most directly affected.

(2)

''That assessment, standing alone, did not involve any charges by PMA to customers or clients of PMA's membership (R. 638). One member of PMA in fact who was handling Volkswagens paid the assessment until it learned that MTC was not paying the assessment (R. 632, footnote)'' (FMC Br. 19).

The support for the assertion that one member of PMA paid the assessment for a period is a finding in a footnote

regarding the Wallenius Lines. As the Examiner observed, this is an "independent carrier" which means that it is not a member of PMA (R. 538-587). Thus, the sentence that PMA's assessment "did not involve any charges by PMA to customers or clients of PMA's membership" is also necessarily false. Whatever this carrier paid toward the Mech Fund must have been passed on to it as a customer or client of one of PMA's members.

(3)

> "MTC's individual decision to pass the cost on to Volkswagen is the specific act which led to and gave rise to this litigation, not the assessment among PMA's membership" (FMC Br. 19).

Contrast this effort to represent MTC's passing-on to petitioner of the PMA assessment as its unilateral act with MTC's description of its position in a brief filed below:

> "Apparently, petitioner would require MTC either to resign from PMA altogether and refrain from contributing to the mech fund, or, alternatively, to raise a major portion of the assessments attributable to petitioner's automobiles from other customers. The total impracticality of either alternative is self-evident. Aside from the fact that resignation would jeopardize MTC's continued ability to operate, it would not enable it to avoid the union's insistence on a contract imposing at least similar if not greater burdens on MTC. Alternatively, should MTC assess a higher charge against other cargo than competing stevedores in order to reduce the charges to petitioner, it would soon lose such other cargo to its competitors." Answering Brief of Intervenor Marine Terminals Corporation, 17.

(4)

> "Upon the evidence presented to it the Commission found no agreement which had a direct competitive effect upon shippers" (FMC Br. 23).

The Commission made no such finding. It never looked for the effect which the agreement actually had upon shippers. It makes very explicit in its opinion—and this is one of the grounds of error urged by petitioner—that it considered the terms of the agreement (R. 675), not its effect, as critical.

(5)

Defending the Commission's holding that petitioner had established no unjust and unreasonable practice in violation of section 17, its counsel says that the Commission found "that there was a sound business basis for the assessment as derived by PMA. The basis of the assessment was derived through the business judgment of PMA" (FMC Br. 30).

The Commission made no finding whatever with reference to "the business judgment of PMA." The Examiner had deliberately refused to "comment on the justness or unjustness, reasonability or unreasonability of the actions of PMA or the aims and purposes of that agreement" (R. 653).

The Commission paralleled his approach, and in discussing section 17, confined itself to what MTC had done. It said in this connection:

> "The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of 'Mech' fund assessment on automobiles, have offered to pass on only a part of the assessment" (R. 677).

The "respondents" to which the Commission referred are MTC, not PMA. PMA was an intervenor, not a re-

spondent. MTC, not PMA, sought to change the assessment and offered "to pass on only a part."

(6)

> "The petitioners have conceded that section 16 of the Shipping Act, 1916, was not violated" (FMC Br. 26).

This contention is as false as it is irresponsible. From the inception of this proceeding, in the very complaint with which it began, petitioner has consistently asserted violation of section 16 (R. 14). Counsel for the Commission purport to find this wholly imaginary concession in petitioner's brief to the Examiner wherein petitioner, recognizing that the Examiner was bound by prior administrative decisions, made clear that it was raising the point so as "to preserve the issue * * * if this case should reach the Commission itself" (R. 652). When that eventuality occurred, this is exactly what petitioner did, taking specific exception to the Examiner's conclusion that there had been no violation of section 16 (R. 664).

B

Brief for Intervenor Marine Terminals Corporation

(1)

Attacking the Solicitor General for correctly denominating the proceeding launched by PMA against MTC a "friendly suit," MTC continues:

> "[I]t is the kind of inflammatory, misleading and unsupported allegation with which the Government's brief abounds. The impression it seeks to create of VW being 'victimized by a monopolistic combination of maritime firms' and as a result having 'to yield to the marine terminal companies' demand that it shoulder the burden of the assessment' (Br. 23) is

> completely false, and the Government's generous use of loaded adjectives does not cure its error. *The interests that bind MTC to VW, its prime customer, are at least as powerful as those that bind it to PMA, its collective bargaining association*" (MTC Br. 3-4) (emphasis supplied).

MTC's counsel must surely know that it is not the Government which is seeking to impose upon this Court. VW may supply ten percent of MTC's business, but PMA controls its right to operate at all. Its brief to the court below more accurately reflected its actual position (p. 17, *supra*).

The very vigor with which MTC challenges VW before this Court, its dutiful echoing of PMA to the point where it "adopts" (MTC Br. 1) PMA's statement of facts, belie its attempt to represent itself as a genuine adversary to PMA. If the proceeding between them were honestly antagonistic, MTC would be supporting VW's position since, if VW prevails, the judgment in the pending District Court action must go in favor of MTC. Yet MTC is bending every effort to ensure that PMA wins. What could be friendlier?

(2)

> "While the Examiner found MTC to be a person subject to the Act (R. 641-642, 672), the Commission refused to do so and simply 'assumed', without deciding, that MTC was subject to the Act for purposes of the decision. (R. 673)
>
> The threshold jurisdictional issue, properly passed by the Commission because its other rulings were dispositive, has therefore not been decided" (MTC Br. 10).

What the record shows is that the only assumption made by the Commission regarding jurisdiction was as to the members of PMA as a group (R. 673).

But MTC fell into a different category. First, MTC had been explicitly found by the Examiner to be covered by the Shipping Act (R. 641-642). Second, MTC had filed an exception to this determination (R. 665). Nevertheless, the Commission reviewed under section 17 the propriety of MTC's passing on of the Mech Fund assessment (R. 676-678). In doing so it necessarily resolved adversely to respondent the jurisdictional question which MTC had placed before it. Thus the threshold jurisdictional question has been decided.

(3)

> "In fact, the United States Army, another major shipper of automobiles as well as containers contracting for its own stevedore services, accepted the assessments. (R. 105-106, 108-109, 121)" (MTC Br. 13).

This is another half truth. What MTC deliberately omits to mention is that the Army for a period of time strenuously contested the assessment on the basis of measurement tons and for a time refused to reimburse their stevedores for such charges (R. 489, 509, 518, 354). As Commissioner Hearn noted, PMA was apprehensive that if Volkswagen was given relief, "the Army would be next in line; '. . . they are still querulous about the propriety of such contributions'" (R. 725).

C

Brief for Pacific Maritime Association, Intervenor

(1)

> "The Committee [appointed by PMA to develop recommendations for allocation of the Mech Fund] did not, prior to the issuance of its report, make any study of the extent to which stevedores handling automobiles could effect savings as compared with

> the costs of the plan (i.e., the productivity approach, which the Committee rejected as unworkable in practice). * * * The Committee did not specifically discuss automobiles prior to the issuance of its report (R. 102a; 111a)" (PMA Br. 6, n. 6).

This statement gives only half the facts. Although the Committee "did not specifically discuss automobiles" before PMA's plan went into effect, PMA's Board of Directors most certainly did, as that body's own minutes disclose (R. 370). Furthermore, it is evident in context that the Board's discussion was sparked by consciousness that the plan hit automobiles particularly hard.

(2)

> "Volkswagen also represented to PMA that freight on automobiles in offshore trades is determined by unit and that tonnage dues in respect to handling of automobiles are paid variously by unit, weight and measurement. (R. 218a; 511a) These representations are contrary to fact but have been repeated by petitioner without noting that the findings establish (1) Volkswagen knew MTC tonnage dues on the handling of its vehicles were computed and paid on a measurement basis (R. 621a; 160a-161a); (2) freights are 'dependent upon measurement' in the offshore trades regardless of how tariffs are quoted. (R. 621a; 670a)" (PMA Br. 10, n. 10).

There is no inconsistency between the finding that MTC's tonnage dues were paid on a measurement basis and our statement that tonnage dues are paid variously by unit, weight and measurement. MTC are only two of the companies discharging automobiles. The record shows that except for MTC, all the stevedoring contractors discharging Volkswagen automobiles paid on the basis of weight and that the dues of one independent carrier were paid on the basis of units (pp. 11-12, *supra*).

The findings completely corroborate Volkswagen's representation that:

> "Ever since Volkswagens were first shipped to the Pacific Coast in 1954, they have been freighted on a unit basis, or on lumpsum FIO or time charter" (R. 511).

What the Commission found was:

> "There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are *on a unit basis* but dependent upon measurement" (R. 669-670) (emphasis supplied).

(3)

> "The Commission rejected such mechanical application of the Act, but insisted that collective undertakings encompassed within Section 15 must involve those activities *affecting ocean transportation,* which the Act promotes or restrains" (PMA Br. 23) (emphasis supplied).

The Commission said not a word regarding "ocean transportation." The Examiner had attempted to exclude PMA's agreement from section 15 on the theory that section 15 does "not require the filing of cooperative working arrangements that did not pertain to ocean transportation" (R. 647).

Before the Commission, petitioner challenged both this interpretation and its application to the facts of this case. Very different grounds were given by the Commission for excluding PMA's agreement from section 15, indicating that the Commission did not agree with the Examiner's formulation.

(4)

> "[T]he Commission has determined that agreements *relating* to collective bargaining are not within its jurisdiction" (PMA Br. 33) (emphasis supplied).

What the Commission did was note that the courts in construing the Interstate Commerce Act "have determined that agreements which affect *only* labor-management relations do not come within its scope" (R. 675) (emphasis supplied). But the Commission did not place its exclusion of PMA's agreement from section 15 on this ground, and the Examiner had explicitly rejected the argument that the Commission lacked jurisdiction "of the agreement establishing the method of collecting the Mech Fund because it is a part of a collective bargaining agreement" (R. 649).

(5)

> "Volkswagen has asserted the existence of a 'cat's paw' conspiracy. The argument is that PMA, with the help of ILWU, has compelled Volkswagen, as an outsider, to contribute to the mechanization fund under a special formula designed to transfer to Volkswagen labor costs which the liner interests of PMA would otherwise have to assume.
>
> The Examiner noted that these contentions were first propounded after the hearing had terminated * * *" (PMA Br. 34).

The contention which the Examiner mistakenly claimed to have been advanced for the first time by VW in its briefs had nothing to do with the ILWU or what PMA terms the " 'cat's paw' theory." VW's contention related solely to PMA and was that "the 'liner' or 'common carrier' interests dominate PMA, particularly in its actions with regard to the Mech Fund assessment" (R. 649, n. 42). How the Examiner could have characterized this contention as raised belatedly is difficult to understand, since the nature of VW's interrogation had given clear notice of its position. The very first witness VW called was PMA's vice-president, and among the questions first addressed to him were queries regarding who controlled PMA (R. 71-75).

D

Brief on Behalf of International Longshoremen's and Warehousemen's Union as Amicus Curiae in Support of Judgment Below.

(1)

> "The agreement that each employer would comply with the Association's formula and not seek to upset it, thereby jeopardizing the whole enterprise, was the *quid pro quo* for the union's agreement not to insist upon writing any formula into the contract. * * *
>
> If one shipper may upset these collective bargaining arrangements by utilizing a strained interpretation of the Shipping Act, then the entire agreement is undermined and the door is open to similar action by other shippers, with the result that shambles may be made of the industry-wide financing of the Mech Fund" (ILWU Br. 10-11).

A careless reader might assume that VW was guilty of going back upon the agreement reached with the Union. In fact, VW was not a party to that agreement and was not consulted regarding it. It is not an "employer" under the terms of that agreement.

What the ILWU is asserting is that no matter what the impact on petitioner of the Union's agreement with PMA, VW should be foreclosed from objecting.

Conclusion

This Court is urged to nullify the Shipping Act and not to interfere with PMA's enrichment of its membership at the expense of petitioner on the ground that action by this Court would jeopardize labor peace on the Pacific waterfront. The ILWU, which, of course, is the beneficiary of whatever is exacted from petitioner by PMA, asserts that to apply section 15, although not sections 16 and 17,

will have a disastrous effect upon the West Coast longshore industry (ILWU Br. 18).

According to ILWU, under the terms of the collective bargaining agreement, PMA will have to refund the moneys already collected and payments to retired dock workers will precipitously come to a halt.

We question whether the agreement compels these results. But even if such construction were correct, what was decided by agreement can equally well be changed by agreement. And the doctrine of *pari delicto* would seem to stand squarely in the way of any attempt by PMA's membership to compel PMA, because of failure to comply with the Shipping Act, to refund the amounts collected. *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation* Co., 159 F.2d 306, 312 (4th Cir. 1947), *cert. denied,* 331 U.S. 827 (1947). If PMA and the ILWU sincerely wish to avoid labor controversy, we think it lies in their power to resolve peacefully any problems which PMA has created by its disregard of the Shipping Act.

But even if our opponent's fears were better grounded, there are other considerations which take precedence over industrial peace even for the most devoted union member. One is that we enjoy a government of laws, not of men, administered by courts operating free of fear or coercion. If labor peace can only be bought by ignoring the clear mandate of the Shipping Act, by denying petitioner the protection of the laws enacted by Congress, and by licensing private rule over our foreign commerce, then too high a price will have been paid.

One-half century ago Congress concluded that the exercise of collective power in the shipping industry requires governmental supervision. The wisdom of that decision is demonstrated by the way PMA has used its governmental-like powers to victimize a shipper employing transportation competitive with that provided by its members. Section 15

of the Shipping Act squarely covers PMA's cooperative working agreement and sections 16 and 17 equally call for condemnation of the discriminatory scheme PMA has embraced. We are confident that this Court will not permit the extraneous considerations which our opponents have introduced to influence its determination of the issues presented by this appeal.

Dated: November, 1967.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1967.

Volkswagenwerk Aktiengesellschaft, Petitioner, *v.* Federal Maritime Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner, a German manufacturer of automobiles, is one of the largest users of the ports on the West Coast of the United States, delivering through them more than 40,000 vehicles each year, the majority transported there by vessels chartered by the petitioner rather than by common carrier. This case grows out of the petitioner's claim that charges imposed upon the unloading of its automobiles at Pacific Coast ports are in violation of the Shipping Act of 1916, as amended. 46 U. S. C. § 801 *et seq.* The dispute has a long and somewhat complicated history.

The Pacific Maritime Association (the Association) is an employer organization of some 120 principal common carriers by water, stevedoring contractors, and marine terminal operators, representing the Pacific Coast shipping industry. The primary function of the Association is to negotiate and administer collective bargaining contracts with unions representing its members' employees, of which International Longshoremen's and Warehousemen's Union (ILWU) is one. In late 1960 the Association and ILWU reached a milestone agreement which, it was hoped, would end a long and troubled history of

labor discord on the West Coast waterfront.[1] The ILWU agreed to the introduction of labor-saving devices and the elimination of certain restrictive work practices. In return, the Association agreed to create over the period from 1961 to 1966 a "Mechanization and Modernization Fund" of $29,000,000 (the Mech Fund) to be used to mitigate the impact upon employees of technological unemployment.[2] The agreement specifically reserved to the Association alone the right to determine how to raise the Fund from its members, at the rate of some $5,000,000 a year.

A committee of the Association investigated various possible formulas for collecting the Fund from the stevedoring contractors and terminal operators—*i. e.*, those Association members who were employers of workers represented by the ILWU. A majority of the committee recommended that the Mech Fund assessment be based solely on tonnage handled, and this recommendation was adopted by the Association membership.[3] Under this

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[1] All parties agree that this agreement was an enlightened, forward-looking step in West Coast longshore labor relations. See Kossoris, Working Rules in West Coast Longshoring, 84 Monthly Labor Rev. 1 (1961); Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Industrial & Labor Relations Rev. 295 (1962); *ILWU* (*American Mail Line*), 144 N. L. R. B. 1432, 1442 (1963).

The agreement was not signed in final form until November 15, 1961, although it was implemented in many respects prior to that date.

[2] The agreement has been continued, and the Mech Fund is still being collected and paid out.

[3] A minority of the committee recommended that the Mech Fund be raised by the same formula by which the Association's dues were levied—a formula combining both tonnage handled and man-hours employed, in a ratio of 40/60.

Although the Mech Fund was initially assessed entirely on the basis of tonnage, the formula was later amended to assess employers of marine clerks on a man-hour basis. About 12% of the fund was collected in this way.

formula, general cargo was assessed at 27½¢ per "revenue ton."[4] A revenue ton is based either on weight (2,000 lbs.=one ton) or measurement (40 cu. ft.=one ton). Whether tonnage declarations on a particular item of cargo were to be by weight or by measurement was to depend, with one exception, upon how that cargo had customarily been manifested (and reported to the Association for dues purposes) in 1959. The one exception was automobiles, for which there had been no uniform manifesting custom.[5] The Association decided that automobiles were to be declared by measurement for Mech Fund purposes, regardless of how they were or had been manifested.

Unlike shippers by common carrier, the petitioner must arrange and pay for the unloading of its own chartered vessels upon their arrival in port. For this purpose it has since 1954 contracted with Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles (Terminals), who are members of the Association, for the performance of stevedoring and related services in unloading vehicles from the petitioner's chartered ships in West Coast ports, at a negotiated price. Prior to the Mech Fund assessment agreement, Terminals' charge to the petitioner for these unloading services was $10.45 per vehicle, of which about a dollar represented Terminals' profit. When the vehicles were assessed for the Mech Fund by measurement, the assessment came to $2.35 per vehicle—representing, if passed on to the peti-

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[4] Bulk cargo was assessed at 5½¢ per revenue ton. In December 1961, the rates were increased to 28½¢ for general cargo and 9¢ for bulk cargo.

[5] On chartered vessels automobiles are manifested on a unit basis (showing weight and sometimes measurement). On common carriers both weight and measurement are shown. In coastwise trade automobiles are manifested by weight.

tioner, an increase in unloading costs of 22.5%.[6] If the vehicles had been assessed by weight (0.9 tons) rather than by measurement (8.7 tons),[7] the assessment would have been 25¢ per vehicle—an increase of about 2.4%, comparable to the average Mech Fund assessment of 2.2% for all other general cargo. Assessment by measurement rather than by weight thus resulted in an assessment rate for the petitioner's automobiles of 10 times that for other West Coast cargo—although automobiles had less to gain than other cargo from the Mech Fund agreement.[8] The petitioner and Terminals both protested these seeming inequities to a committee of the Association set up to handle such claims, but without success.[9]

The petitioner refused to pay any additional charge resulting from the Association's levy, and Terminals, while continuing to unload Volkswagen automobiles for the petitioner, did not pay its resulting assessment to the Association. The Association sued Terminals in a federal court in California for its failure to pay the Mech Fund assessments; Terminals admitted all the allegations of

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[6] Sometime after the assessment agreement was implemented, Terminals' charge to the petitioner exclusive of the assessment decreased. The amount of the decrease does not appear in the record.

[7] These figures represent a weighted average of the petitioner's two model lines at the time of the assessment agreement. Passenger models were 0.8 ton by weight and 7.8 tons by measurement; unloading costs initially increased an estimated 22%. Transporter models were 1.1 tons by weight and 11.4 tons by measurement; unloading costs initally increased an estimated 31%.

[8] When the Mech Fund agreement was reached, the unloading of automobiles was already so highly mechanized that there was little likelihood of improvement. Hence shippers of automobiles stood to receive from the agreement only the general benefits of a stable labor situation, such as freedom from strikes and slowdowns.

[9] The committee did make downward adjustments for scrap metal and lumber.

the complaint and impleaded the petitioner as a defendant. The petitioner then obtained a stay of that action to permit it to invoke the primary jurisdiction of the Federal Maritime Commission, in order to determine the following issues:

> "1. Whether the assessments claimed from [the petitioner] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U. S. C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.
>
> "2. Whether the assessments claimed from [the petitioner] result in subjecting the automobile cargoes of [the petitioner] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U. S. C. 815 (1961).
>
> "3. Whether the assessments claimed from [the petitioner] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U. S. C. 816 (1961)."

The petitioner then began the present proceedings by filing a complaint with the Commission raising the above issues. The petitioner alleged that the Association was dominated by common carriers [10] who had agreed upon the assessment formula in order to shift a disproportionate share of the Mech Fund assessment onto the peti-

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[10] By virtue of the Association's bylaws, carriers control the Board of Directors and all membership votes. Both the committee which devised the assessment formula and the one which later ruled on claims of inequities were made up entirely of carriers; neither committee had a single member who was a stevedoring contractor or terminal operator.

tioner, which did not patronize those common carriers.[11] The Commission, after a hearing, upheld the initial decision of its examiner and dismissed the complaint, with two dissents.[12] The Court of Appeals for the District of Columbia Circuit affirmed,[13] and we granted certiorari to consider important questions under the Shipping Act.[14]

I.

The petitioner's primary contention—supported by the United States, a party-respondent—is that implementation of the Association's formula for levying the Mech Fund assessments was unenforceable, because the agreement among Association members imposing that formula was not filed with the Commission in accord with § 15 of the Act. That section provides that there be filed with the Commission "every agreement" among persons subject to the Act

> "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition;

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[11] The petitioner is the largest shipper of dry cargo by charter to West Coast ports. It ships more than 75% of its vehicles by charter and most of the rest by common carriers which are not members of the Association. About two-thirds of all automobiles imported through West Coast ports are Volkswagens. It appears that no other importer of automobiles through West Coast ports uses chartered vessels.

Most, but not all, of the stevedoring contractors and terminal operators passed the Mech Fund assessment on to their customers. In most instances these customers were common carriers who were members of the Association. The member carriers did not pass the assessment on to shippers. Hence, except in situations like the petitioner's, the cost of the Mech Fund was borne by Association members.

[12] *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals Corp.*, 9 F. M. C. 77.

[13] *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 371 F. 2d 747.

[14] 388 U. S. 909.

> pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive preferential, or cooperative working arrangement. . . ." [15]

Until submitted to and approved by the Commission, "it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . ." [16] The Commission is directed to disapprove any agreement

> "that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers,

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[15] "Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements." 46 U. S. C. § 814.

The original statute in 1916 required filing with the United States Shipping Board. 39 Stat. 728, 729, 733. The Shipping Board was succeeded in 1933 by the United States Shipping Bureau of the Department of Commerce, Exec. Order No. 6166, § 12 (1933); in 1936 by the United States Maritime Commission, 49 Stat. 1985; in 1950 by the Federal Maritime Board, 64 Stat. 1273; and in 1961 by the Federal Maritime Commission, 75 Stat. 840. In this opinion the Federal Maritime Commission and its predecessors are collectively referred to as the Commission.

[16] "Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall

or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of [the Act]. . . ." [17]

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be unlawful, and agreements, modification, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817 (b) of this title and with the provisions of any regulations the Commission may adopt." 46 U. S. C. § 814.

[17] "The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any

An agreement filed with and approved by the Commission is immunized from challenge under the antitrust laws.[18]

The Commission held that, although the Mech Fund assessment formula was a "cooperative working agreement" clearly within the plain language of § 15, it nonetheless was not the kind of agreement required to be filed with the Commission under that section:

> "Although the literal language of section 15 is broad enough to encompass any 'cooperative working arrangement' entered into by persons subject to the Act, the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives.
>
> . . . . . .
>
> "It is not contested that the membership of [the Association] entered into an agreement as to the manner of assessing its own membership for the collection of the 'Mech' fund. Such an agreement, however, does not fall within the confines of section 15 as, standing by itself, it has no impact upon

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member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." 46 U. S. C. § 814.

[18] "Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1–11 and 15 of Title 15, and amendments and Acts supplementary thereto." 46 U. S. C. § 814.

> outsiders. What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the [Association] membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators." 9 F. M. C., at 82–83.

The Court of Appeals affirmed. That court felt itself confined by our decision in *Consolo* v. *FMC*, 383 U. S. 607, to determining simply whether the Commission's ruling was supported by "substantial evidence." With "due deference to the expertise of the Commission," it concluded "(albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commision's decision." 371 F. 2d, at 755.

The issue in this case, however, relates not to the sufficiency of evidence but to the construction of a statute. The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *NLRB* v. *Hearst Publications*, 322 U. S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U. S. 143, 153–154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 385, and "are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown Food Store*, 380 U. S. 278, 291. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318. Cf. *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 499–500 (where this Court overturned the Commission's construction of § 14 of the Shipping Act).

In limiting § 15 to agreements which "affect competition" and in finding that the assessment agreement did not so "affect competition," the Commission in this case used that phrase in a highly artificial sense—by requiring "an additional agreement by the [Association] membership to pass on all or a portion of its assessments . . . ." There is no question that the assessment agreement necessarily affected the cost structures of, and the charges levied by, individual Association members. Most, though not all, of the stevedoring contractors and terminal operators did pass the assessment on. The economic realities were such that many of them had no choice—a fact of which they apprised the Association at the time the assessment arrangement was being devised.[19] In the case of Terminals, the assessment it had to pay on Volkswagen automobiles was more than twice its profit margin.

The Commission thus took an extremely narrow view of a statute that uses expansive language. In support of that view, the Commission argued in this Court that a narrow construction of § 15 should be adopted in order to minimize the number of agreements that may receive antitrust exemption. However, antitrust exemption results not when an agreement is submitted for filing, but only when the agreement is actually approved; and in deciding whether to approve an agreement, the Commission is required under § 15 to consider antitrust

[19] The dissenting opinion of Commissioner Patterson vigorously attacked the Commission's finding that there was no implied understanding among the Association members that the assessment would be passed on. 9 F. M. C. 101–104. The Court of Appeals found considerable evidence in support of Commissioner Patterson's view. 371 F. 2d, at 755, n. 7. However, applying the substantial evidence rule, the court upheld the Commission's finding, although indicating that it might have found the facts differently itself. 371 F. 2d, at 755–756.

implications.[20] *FMC* v. *Aktiebolaget Svenska Amerika Linien, post,* at ——; see also *Isbrandtsen* v. *United States,* 211 F. 2d 51.[21]

The Commission itself has not heretofore limited § 15 to horizontal agreements among competitors, but has applied it to other types of agreements coming within its literal terms. See, *e. g., Agreements Nos. 8225 and 8225–1, Between Greater Baton Rouge Port Commission and Cargill, Inc.,* 5 F. M. B. 648 (1959), affirmed, 287 F. 2d 86, and *Agreement No. T–4: Terminal Lease Agreement at Long Beach, California,* 8 F. M. C. 521 (1965), applying § 15 to lease agreements.[22] In the latter case, decided only four months before its decision in the case before us, the Commission said:

> "Section 15 describes in unambiguous language those agreements that must be filed; it does not speak of agreements per se violative of the Sherman Act.

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[20] One of the standards for approval under § 15, added in 1961, 75 Stat. 763, is whether or not the agreement is "contrary to the public interest." See n. 17, *supra.* "We think it now beyond dispute that 'the public interest' within the meaning of section 15 includes the national policy embodied in the antitrust laws." *Mediterranean Pools Investigation,* 9 F. M. C. 264, 289.

Any agreement subject to § 15 filing that is not both filed and approved is not only illegal under § 15 but also subject to attack under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213.

[21] "[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute." 211 F. 2d, at 57.

[22] See also statement of Commission Chairman Harlee requesting from Congress the authority for the Commission to exempt from § 15 such otherwise included agreements as those between two freight forwarders in different ports to perform services for each other. H. R. Rep. No. 2248, 89th Cong., 2d Sess., 4–5 (1966).

> Since the wording of section 15 is clear, we need not refer to the legislative history; there is simply no ambiguity to resolve." 8 F. M. C., at 531.

To limit § 15 to agreements that "affect competition," as the Commission used that phrase in the present case, simply does not square with the structure of the statute.[23]

The legislative history offers no support for a different view. The genesis of the Shipping Act was the "Alexander Report" in 1914.[24] *FMB* v. *Isbrandtsen Co.*, 356 U. S. 481, 490. While it is true that the attention of that congressional committee was focused primarily upon the practices that had cartelized much of the maritime industry, it is clear that the concerns of its inquiry were far more broadly ranging. The report summed up the testimony before the committee:

> "Nearly all the steamship line representatives . . . expressed themselves as not opposed to government supervision . . . and approval of *all agreements or arrangements which steamship lines may have entered into with other steamship lines, with shippers, or with other carriers and transportation agencies.* On the other hand, the shippers who appeared as witnesses . . . were in the great majority of instances favorable to a comprehensive system of government supervision . . . [and] *the approval of contracts, agreements, and arrangements, and the general supervision of all conditions* of water transportation which vitally affect the interests of shippers." Alexander Report, at 418. (Emphasis added.)

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[23] Section 15 requires filing of "every agreement" in any of seven categories, and one of the seven comprises all agreements which "regulat[e] . . . competition." See n. 15, *supra*. The other six categories would be rendered virtually meaningless by the Commission's construction.

[24] House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations, H. R. Doc. No. 805, 63d Cong., 2d Sess, 415–424 (1914).

The committee recommended, among other things:

> "That all carriers engaged in the foreign trade of the United States, parties to any agreements, understandings, or conference arrangements hereinafter referred to, be required to file for approval . . . a copy of all written agreements (or a complete memorandum if the understanding or agreement is oral) entered into (1) with any other steamship companies, firms, or lines engaged directly or indirectly in the American trade, or (2) with American shippers, railroads or other transportation agencies." Alexander Report, at 419–420.

Nothing in the legislative history suggests that Congress, in enacting § 15 of the Act, meant to do less than follow this recommendation of the Alexander Report and subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry.[25]

This is not to say that the Commission is without power to determine, after appropriate administrative proceedings, that some types or classes of agreements coming within the literal provisions of § 15 are of such a *de minimis* or routine character as not to require formal filing. Since the Commission's decision in the present case, Congress has explicitly given it such authority:

> "The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of such persons from any requirement of this chapter, or Intercoastal Shipping Act, 1933,

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[25] The recommendations of the Alexander Report were incorporated into both the House and Senate Reports on the Shipping Act. H. R. Rep. No. 659, 64th Cong., 1st Sess., 27–32 (1916); S. Rep. No. 689, 64th Cong., 1st Sess., 7–12 (1916).

where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

"The Commission may attach conditions to any such exemptions and may, by order, revoke any such exemption." [26] 46 U. S. C. § 833a.

[6] But the agreement with which we deal here—levying $29,000,000 over five years, binding all principal carriers, stevedoring contractors, and terminal operators on the Pacific Coast, and necessarily resulting in substantially increased stevedoring and terminal charges—was neither *de minimis* nor routine. We hold that this agreement was required to be filed under § 15 of the Act.

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[26] The need for this provision is set forth in S. Rep. No. 1459, 89th Cong., 2d Sess, 2 (1966):

"The Federal Maritime Commission under the Shipping Act, 1916, regulates certain operations of water carriers and other persons subject to the act which have only slight effect on the foreign commerce of this country and are not significant in the overall design of regulation contemplated by the 1916 act. Exacting compliance with the act under these circumstances has proven unnecessarily costly to the carrier and the Government.

"The authority conferred under this legislation will relieve the Commission and affected carriers of an undue regulatory burden. In addition, a general exemption will preclude the necessity for a piecemeal approach in the future."

Prior to this 1966 amendment, the Commission had taken some steps to protect itself from *de minimis* filings. In *Section 15 Inquiry*, 1 U. S. S. B. 121 (1927), the Commission held "routine" intraconference changes and transactions not subject to § 15. In *Oranje Line* v. *Anchor Line*, 6 F. M. B. 199, 209 (1961), the Commission construed its decision in *Los Angeles By-Products Co.* v. *Barber S. S. Lines*, 2 U. S. M. C. 106 (1939), as holding joint advertising not subject to § 15. Proceeding under general power to issue regulations conferred on it in 1961, 46 U. S. C. § 841a, the Commission exempted at least one class of *de minimis* agreements in 46 CFR §§ 530.5–(d)(4) and (5), dealing with certain terminal agreements.

It is to be emphasized that the only agreement involved in this case is the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case. Moreover, so far as the record shows, only the assessment on automobiles is now challenged, and there is no reason to suppose that the Commission will not consider expeditious approval of so much of the agreement as is not in dispute.

II.

The petitioner also attacked the Association's assessment of its automobiles under § 16 and § 17 of the Shipping Act. Section 16 makes it unlawful "to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage," [27] and

[27] "It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic

§ 17 forbids any "unjust or unreasonable" regulation or practice "relating to or connected with the receiving, handling, storing, or delivering of property." [28] The Commission ruled that neither of these sections had been violated, and the Court of Appeals affirmed:

If the agreement is now filed under § 15, the Commission will be called upon again to consider the effect of §§ 16 and 17, since an agreement that violates a specific provision of the Act must be disapproved.[29] Accordingly, it is not inappropriate, without now passing upon the ultimate merits of the §§ 16 and 17 issues, to give brief consideration to the Commission's handling of those issues upon the present record.

The Commission ruled that the petitioner had failed to demonstrate any "undue or unreasonable prejudice or disadvantage" under § 16 solely because it had not shown any unequal treatment as between its automobiles and other automobiles or cargo competitive with automobiles. In so ruling, the Commission applied the "competitive relationship" doctrine which it has developed in cases concerning rates for carriage of goods by sea.[30]

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in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 46 U. S. C. § 815.

[28] "Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 46 U. S. C. § 816.

[29] See n. 17, *supra*.

[30] See, *e. g.*, *Boston Wool Trade Assn.* v. *M. & M. T. Co.*, 1 U. S. S. B. 24 (1921); *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.*, 1 U. S. S. B. 101 (1926); *Philadelphia Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U. S. S. B. 538 (1936); *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij "Nederland,"* 4 F. M. B. 343 (1953); *West Indies Fruit Co.* v. *Flota Mercante*, 7 F. M. C. 66 (1962).

But the Commission, in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity,[31] has often found § 16 violations even in the absence of a "competitive relationship." See, *e. g., Practices, etc., of San Francisco Bay Area Terminals,* 2 U. S. M. C. 588 (1941) and 709 (1944), and *Storage Practices at Longview, Washington,* 6 F. M. B. 178 (1960), involving storage charges; and *New York Foreign Freight Forwarders and Brokers Assn.* v. *FMC,* 337 F. 2d 289, involving freight forwarders' fees. In a proceeding subsequent to its decision in the present case, the Commission explicitly dispensed with the competitive relationship requirement with respect to port "free time." *Investigation of Free Time Practices—Port of San Diego,* 9 F. M. C. 525 (1966); cf. *California* v. *United States,* 320 U. S. 577. See also *Investigation of Household Goods, North Atlantic Mediterranean Freight Conference,* F. M. C. Docket No. 66–49 (June 30, 1967). When the agreement in the present case is filed, the Commission may consider anew whether the mere absence of a competitive relationship should foreclose further § 16 inquiry.[32]

With respect to § 17, the Commission found that the assessment upon the petitioner's automobiles was not "unreasonable," because the petitioner had received

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[31] See Bross, Ocean Shipping (1956) 189–190; Cufley, Ocean Freights and Chartering (1962) 400–407.

[32] The Interstate Commerce Commission has a competitive relationship rule with respect to § 3 (1) of the Interstate Commerce Act, *Rheem Mfg. Co.* v. *Chicago, R. I. & P. R. Co.,* 273 I. C. C. 185; *United States* v. *Great Northern R. Co.,* 301 I. C. C. 21. However, that Commission has said:

"This Commission has never held that competition is an indispensable element in a situation of undue prejudice and preference, although it has frequently said that 'ordinarily,' or 'generally,' a competitive relationship must appear." *Joseph Goddard Realty* v. *New York, Chicago & St. Louis R. Co.,* 229 I. C. C. 497, 501.

"substantial benefits" in return for the assessment, and there was no showing of a deliberate intent to impose an unfair burden upon the petitioner. This, we think, reflects far too narrow a view of § 17. It may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under § 17, even though not all members of the group receive equal benefits. See *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans*, 6 F. M. B. 415.[33] But here a relatively large charge was unequally imposed. The benefits received by the petitioner may have been substantial, but other cargo received greater benefits at one-tenth the cost.[34] Moreover, the question of reasonableness under § 17 does not depend upon unlawful or discriminatory intent. As the Commission itself has said:

> "[Sections 16 and 17] proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing of the act, and the question of intent is not involved." *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17*, 7 F. M. C. 673, 675–676 (1964).

Cf. *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 523–526; *ICC* v. *Chicago G. W. R. Co.*, 209 U. S. 108.

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[33] In the *Evans Cooperage* case the Commission upheld a uniform wharfage charge which was imposed on all those who used the wharf, even though the various users of the wharf did not all receive precisely equal benefits from it. But the Commission looked beyond "substantial benefits" to the relationship between the service and the charge:

"The [Commission of the Port of New Orleans] has made a charge to help defray its costs of operating facilities as measured by cargo handled in the area and the only question is *whether* its facilities are being used and *the commission is performing a service reasonably related to its charges*. The Examiner considered the evidence and found that it was." (Emphasis added.) 6 F. M. B., at 418–419.

[34] See n. 8, *supra*.

The question under § 17 is not whether the petitioner has received some substantial benefit as the result of the Mech Fund assessment, but whether the correlation of that benefit to the charges imposed is reasonable. The "substantial benefits" measure of unreasonableness used by the Commission in this case is far too blunt an instrument. Nothing in the language or history of the statute supports so tortured a construction of the phrase "just and reasonable." The Commission has cited no similar construction of the phrase by any other regulatory agency or court. Indeed, in past decisions the Commission itself has not applied any such test. See *California Stevedore & Ballast Co.* v. *Stockton Elevators, Inc.*, 8 F. M. B. 97 (1964), and *Practices, etc., of San Francisco Bay Area Terminals*, 2 U. S. M. C. 588 (1941), affirmed 320 U. S. 577, where the Commission found violations of § 17 even though the benefits received were clearly substantial. The proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1967.

Volkswagenwerk Aktiengesellschaft, Petitioner, *v.* Federal Maritime Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1968.]

Mr. Justice Harlan, concurring.

Although I agree with the conclusions reached by the Court in this case, I deem it desirable to amplify the reasons, as I see them, for what is decided today. More especially, I think that further justification is needed for the Court's decision (1) that the "assessment agreement" falls within the Commission's jurisdiction under § 15 notwithstanding its intimate connection with the underlying collective bargaining agreement; and (2) that the Commission should give further consideration to the §§ 16 and 17 issues notwithstanding that it has already determined them.

I.

The Pacific Maritime Association is a multi-employer collective bargaining group. Its "assessment agreement" directly in question here is closely related to a collective bargaining agreement covering a subject about which employers are required to bargain, "terms and conditions of employment."[1] This underlying labor agreement was, according to apparently unanimous industry and expert opinion, a highly desirable step forward in the shipping industry.

[1] 61 Stat. 142, 29 U. S. C. § 158 (d).

Multi-employer collective bargaining units have long been recognized as among the unit classifications that the National Labor Relations Board may deem "appropriate." In *Labor Board* v. *Truck Drivers Union*, 353 U. S. 87, we held that Congress intended

> "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future." *Id.*, at 96.

We specifically referred to longshoring as an industry with a long history of multi-employer bargaining, and we noted

> "cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *Id.*, at 95.

The Board has authorized a multi-employer bargaining unit for West Coast shipping, and the labor agreement that forms the background to this case is additional "cogent evidence."

At the same time, the very existence of multi-employer units, and the obvious need for the employers involved to agree on collective policy, must invariably have competitive effects. The signatories to a collective bargaining agreement are frequently, by the very act of signing, agreeing with their own competitors on matters such as labor costs, certain nonlabor costs, services to be provided to the public, and (indirectly) price increases.

Multi-employer collective bargaining must therefore be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, *viz.*, the antitrust laws and, in the case of maritime labor

relations, the Shipping Act. This is a problem on which Congress has provided relatively little direct guidance,[2] but it is one of a kind that the Court has repeatedly grappled with since *Allen-Bradley Co.* v. *Union*, 325 U. S. 797. It is a problem of line drawing.

The Court, noting that the assessment agreement levied $29,000,000, thus "necessarily resulting in substantially increased stevedoring and terminal charges," *ante*, p. 15, holds that the assessment agreement must be filed under § 15 of the Act. It says that the underlying labor agreement is not before us and the "continuing validity" of that agreement is not brought into question by today's decision. *Ante*, p. 16.

On the other hand, my Brother DOUGLAS argues that on the Court's premise the assessment agreement could not be distinguished from any collective bargaining agreement that "raised labor costs beyond the point at which PMA members could be expected to absorb these costs without raising prices or charges." *Post*, p. 18. He further contends that if part of a collective bargaining agreement is subject to Commission approval, this will stifle labor negotiation.[3] Consequently, he suggests that a proper accommodation between "labor" and "competition" interests can be reached by exempting both

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[2] Section 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17, provides that "[t]he labor of a human being is not a commodity or article of commerce." Section 15 of the Shipping Act, 39 Stat. 733, 46 U. S. C. § 814, provides that agreements filed and approved by the Commission "shall be excepted from the provisions of sections 1–11 and 15 of Title 15 [antitrust provisions] . . . ."

[3] Of course, Congress did not, in § 15, require "good" agreements to be filed and exempt bad ones. Nor did Congress provide a special exemption for cases in which it would create a special hardship to require filing of an agreement that was not filed when it should have been. My Brother DOUGLAS is making a much more relevant and serious point than that the Court's decision will do incidental damage to a "good" agreement.

labor agreements and labor-related agreements from the filing requirement of § 15 but leaving them subject to the specific prohibitions of the antitrust laws and §§ 16 and 17 of the Shipping Act.

This suggested accommodation seems to me demonstrably wrong. In the first place, as the Court notes, the filing requirement of § 15 was drafted broadly, and the filing-and-approval process includes review of questions arising under §§ 16 and 17, and specifically creates an exemption from antitrust attack. Hence, if the question were simply whether substantive challenge to a maritime agreement (dealing with labor or with any other matter) is to take place in advance of implementation of the agreement or, instead, during its operation, I should have thought it clear that Congress chose the former alternative. Furthermore, I would find it very difficult to see why provision for advance approval and exemption of labor-related agreements would not be preferable, from the standpoint of facilitating collective bargaining, to the "wait-and-see" approach.

The real difficulty in this case is not to distinguish between agreements that must be filed and agreements whose impact on competition will be evaluated after implementation, but to define the Commission's jurisdiction in such a way that (whether challenges arise before or after implementation) the Commission will not improperly be brought into labor matters where it does not belong. The Court's only suggestion is that the labor agreement involved in this case "falls in an area of concern to the National Labor Relations Board." *Ante,* p. 16.

More circumspect analysis than this is needed, I believe. In the first place, since the later validity and antitrust immunity of all agreements subject to § 15 depends upon filing, it is desirable that signatories to agreements be given more precise instructions than that

they need not file if they are in an area of Labor Board "concern." Furthermore, I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both.

The Commission took the position that § 15 of the Act, requiring filing, was meant to apply "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist when dealing with the shipping or travelling public or their representatives." [4] I agree with the Court's conclusion that proper application of that principle to this case would require the opposite result from the one the Commission reached. The difficulty, however, is that the principle is excessively broad: any significant multi-employer agreement on economic matters "affects competition" with respect to prices and services to the public, even if it is a collective bargaining agreement or an employer agreement collateral thereto.

Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the filing requirements of § 15 and from successful challenge under the antitrust laws or under the substantive principles in §§ 16 and 17 of the Shipping Act. The exact extent of the "labor exemption" or "labor immunity" from statutes regulating competition has troubled this Court before; [5] how-

[4] 9 F. M. C. 82.

[5] *E. g., Mine Workers* v. *Pennington,* 381 U. S. 657; *Meat Cutters* v. *Jewel Tea,* 381 U. S. 676; cf. *Kennedy* v. *Long Island R. Co.,* 319 F. 2d 366, 372–374. In *Mine Workers* the Court said, "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws . . . ." 381 U. S., at 664. It seems equally obvious that the employers are not violating the antitrust laws either when

ever, since no collective bargaining agreement in the maritime industry is now before us, it would be inappropriate to suggest the affirmative extent of the immunity. The important point in this case is an opposite and two-edged one: the assessment agreement before us is *not* immune or exempt, for it raises "shipping" problems logically distinct from the industry's labor problems; at the same time, Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve.

The assessment agreement was, of course, consequent upon the labor agreement committing PMA to raise the fund. The union side was concerned with a guarantee that the fund would be raised somehow, and the labor agreement guaranteed only that much. But whenever any multi-employer bargaining unit agrees to provide benefits for employees there arises a problem of how to allocate the costs among the various employers and (in consequence) among their customers.

Often, the "allocation" decision follows directly from the terms of the labor agreement. In the case of a multi-employer agreement to raise wages, for example, each employer simply bears the cost of benefiting his own employees. In the present case, had it been possible to make the levy on each employer directly proportional to, and roughly simultaneous with, the savings to that employer from modernization, two things would follow: the "allocation" decision could be said to stem directly from the terms of the labor agreement, and the modernization program would "pay for itself" as it went along, leaving shipping customers unaffected.

The PMA, however, did not (and presumably could not) apportion costs in this manner. To the extent that, under the plan chosen, individual employers were

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they confer about wage policy preparatory to bargaining or when they sign an agreement.

unable to absorb the levy and debit it against future savings from modernization, the decision how much each employer was to pay necessarily affected that employer's customers as a class. To the extent that the plan went on to determine which of an employer's customers would ultimately pay which share of an employer's dues, the agreement also made choices among customers of an individual employer.

The Commission nevertheless held that the agreement did not "affect competition" because there was "no agreement" to pass the levy on to individual customers. Whether the error be deemed one of "fact" or one of "law" these conclusions are irreconcilable with reality. Terminal companies such as MTC compete with each other for the business of unloading Volkswagens. The allocation agreement involved in this case increases the *cost* to a terminal company of unloading one Volkswagen by $2.35. This is a substantial (22%) increase in the company's cost for handling this one product. Since the mechanization and modernization program is not expected to produce a significant (much less a compensatory) saving in the other costs of handling Volkswagens, no terminal company could, in the long run, "absorb" this cost: companies do not absorb costs that are not expected to pay dividends in the future.[6] MTC's only choice was whether to pass the $2.35 on directly to Volkswagen or to pass it on to its other customers in the form of higher charges or lower future savings from mechanization. Since the latter alternative would presumably have driven these other customers to deal with other terminal companies not

[6] The fact that the figure $2.35 was in fact arithmetically larger than MTC's computed profit per Volkswagen on the accounting basic MTC used is of course not in itself critical. If MTC's computed profit per vehicle had been $2.36, it would have had nevertheless to make up the $2.35 additional cost somewhere.

bearing the Volkswagen curse, MTC was in practice compelled to pass at least a large part of the additional cost on to Volkswagen.

The statements of numerous officials of the participating companies to the effect that there were no "agreements" affecting Volkswagen (statements constituting in large part the "substantial evidence" on which the Commission is supposed to have relied, 371 F. 2d, at 756), are at best quibbles about the meaning of words. The members of the Association must be taken to have agreed to the obvious consequences of the paper they all signed. That paper did not destroy price competition for Volkswagen's trade; nor would a specific agreement to "pass on" the additional $2.35 charge have done so. But the allocation agreement made Volkswagen a less desirable customer to each and every terminal company unless it did pass on the $2.35 charge. How the Commission could conclude that this collective imposition, by the terminal companies on themselves, of a heavy tax for handling one kind of product did not "affect" competition among them for the trade of shippers of that product I simply cannot understand.

Commission review of the fairness of the agreement allocating the cost burden of mechanization does not mean Commission review of a labor agreement and does not imply consequences in conflict with national labor policy. Whether to mechanize, or otherwise modernize, and what provision should be made for displaced workers, are obviously matters of union concern, and negotiations about these things should be governed by the law of collective bargaining. Resolution of such questions by a decision to create a "Mech" fund gave rise to a subsidiary "allocation" question. The union was concerned that the question receive *some* answer, but had no proper interest in *which* of the possible cost allocation plans was adopted, so long as any such plan raised the amount

promised. On the other hand, in the present case no one has suggested that Maritime Commission review of a particular method of cost allocation may properly reach the question whether the obligation necessitating the allocation should have been entered into, or that the Commission may reject an allocation plan when there are no preferable alternative routes to collection of the necessary amount. Review of the fairness and propriety of a taxing scheme is not the same thing as reviewing the fairness and propriety of the uses to which the tax money, once collected, is put. When the Court notes that only the assessment agreement must be filed and examined, it seems clear that it contemplates a Commission examination starting from the premise that the obligation to collect the Mech fund will be fulfilled; at issue will be only the propriety of the choice of the route to that objective.[7]

II.

With respect to the §§ 16 and 17 issues, I consider that the Commission's approach to those questions rested, as indeed the Court's opinion now intimates, upon an erroneous understanding of the "assessment agreement" necessitating reconsideration of those matters on remand of the case.

The agreement that was before the Commission was, so far as appears, quite unlike any agreement that body had considered before. It dealt neither with a charge for particularized services in the carrying, handling, or storage of goods, nor with how such services would be

[7] The fact that the "labor" agreement and the "assessment" agreement were on different pieces of paper is of course not critical. What is important is that the whole process raised both labor problems and distinct shipping problems. It would not be impossible for there to be a single agreement raising some problems of Labor Board "concern" and other, separate problems appropriate to Commission review.

provided. Rather, the agreement levied a "tax" on Association members, a tax which (insofar as the modernization program did not directly "pay its own way") would be passed on to members' customers and ultimately to the public. The tax would be used to pay for a general benefit to the shipping industry, but the allocation of that tax bore no direct relationship to benefits received by customers.

The Court holds that it was error for the Commission to reject challenges to this agreement under § 16 simply because there was no showing that the tax was discriminatory as between competitive customers. It declares that such a rule may be sound in cases involving rates for sea carriage of goods because of the "particularized economics" resulting from the finite capacity of ships, but that it is not sound elsewhere, including this case, for unspecified reasons.

On the surface, it might appear that the argument should be the other way around: it makes some sense to speak of an "undue or unreasonable preference or advantage" to, say, watermelons over automobiles when they are "competing" for a finite amount of shipping space; it becomes much more difficult to find anything that can be called a "preference" between such products with respect to any services that are available to both in unlimited quantities.

My Brother DOUGLAS states that the Commission has consistently adhered to its insistence upon a competitive relationship between the product preferred and the product disadvantaged, except where "there are services that are not dependent upon the nature of the cargo and the varying charges thereof." *Post*, p. 20, n. 29. Yet, if ever it was clear that "the nature of the product[s]" was not the basis for a difference in rates, it is in this case.

The true solution of the matter, it seems to me, is that in each situation the problem has been to devise some *workable* basis for determining whether rates are fair *vis-à-vis* other rates. It simply would not be feasible, as the Second Circuit has noted,[8] to assess the fairness of charges for shipping heavy industrial equipment by comparison with the cost of shipping bananas. The notion of a "preference" for bananas over heavy equipment is simply too elusive to be implemented. At the same time, when the service rendered is, for example, procuring insurance or arranging for cartage, the nature of the product has very little to do with either the value to the customer of the services rendered or the cost of supplying them; in such cases the Commission has quite reasonably held that charging different classes of shippers different amounts for equivalent services may be preferential.[9]

In the present case, the problem before PMA was the allocation of a pre-specified total cost among its various members and their customers. Since this was very much a case of first impression, the Commission would have done well to go back to the language of § 16, which proscribes any "undue or unreasonable preference or advantage to any . . . description of traffic in any respect whatsoever."[10] Certainly, since a "modernization tax" on any one group of customers lowered, by an equivalent amount, the cost of modernization to others obligated to pay for it, an unfair allocation of the burden could properly be described as a "preference" between

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[8] *New York Foreign Freight Forwarders & Brokers Assn.* v. *FMC*, 337 F. 2d 289, 299.

[9] *Ibid.*; see, *e. g.*, Investigation of Free Time Practices—Port of San Diego, 9 F. M. C. 525.

[10] 46 U. S. C. § 815.

collective bargaining in the maritime industry. If the tariff exacted from petitioner is discriminatory or unreasonable, §§ 16 and 17 of the Shipping Act [2] provide a remedy. If it violates the antitrust laws, there is also a remedy, as I shall indicate. But to require the funding part of maritime collective bargaining agreements to receive prior approval from the Maritime Commission is to use a sledge hammer to fix a watch. I cannot read § 15 so as to attribute to Congress such a heavy-handed management of sensitive labor problems.

The collective bargaining agreement involved in this case, with its mechanization and modernization (M & M) fund, cannot be evaluated properly without an understanding of maritime labor relations and technological developments in the shipping industry.

The history of maritime labor relations in this country has been punctuated with lengthy major strikes and continuous minor disruptions.[3] The maritime industry

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[2] Those sections read, in relevant part:

"It shall be unlawful for any . . . person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly . . . to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 46 U. S. C. § 815 (§ 16).

"Every . . . person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. 46 U. S. C. § 816 (§ 17).

[3] For a comprehensive study of the history of labor relations in the maritime industry up to 1940, see Maritime Labor Board, Report to the President and to the Congress, H. R. Doc. No. 646, 76th Cong., 3d Sess. (1940–1941). For a valuable history of maritime labor relations on the West Coast, see Schneider, Industrial Relations in the West Coast Maritime Industry, Institute of Industrial Relations, University of California (Berkeley, 1958).

has long been faced with problems of instability—economic and managerial. Employment for maritime workers is generally both irregular and insecure.[4] That condition lies behind the large number of major strikes and work stoppages on our coasts.

Because the shipping industry is vitally important both to our national commerce and national defense, the Federal Government has maintained a special interest in trying to promote its growth and stability. The Shipping Act of 1916 is one example of this concern.[5] With respect to maritime labor relations, however, the activities of the Federal Government were, until our entry into World War I, primarily devoted to laws protecting or disciplining seamen as individual workers. The war years saw the Government actively encouraging collective bargaining in the maritime industry, its efforts resulting by 1920 in a significant expansion of collective bargaining. There followed a general retrogression, with wages and working conditions reaching low levels. That condition prevailed until the highly disruptive and violent Pacific Coast strike of 1934.

That strike was the product of deepseated grievances of maritime employees regarding low wages and poor

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[4] Longshoremen and seamen depend, of course, on the amount of work to be done. If business is bad, the workers are without work and without pay. With respect to longshoremen on the Pacific Coast, hiring is done through hiring halls operated jointly by the union and management. Employers can obtain longshoremen only through these halls, and only for specific jobs. No longshoreman may be employed steadily by any one employer; rather, each is dispatched to an employer as part of a gang to perform a specific loading or unloading job. See Kossoris, Working Rules in West Coast Longshoring, 84 Monthly Labor Rev. 1 (1961), for an account of the hiring practice on the West Coast.

[5] This Act was the direct result of the Alexander Report of 1914. House Committee on Merchant Marine and Fisheries, H. R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

that "description of traffic" bearing a heavy burden and that "description of traffic" whose burden was correspondingly lightened.

The real difficulty in this case is to formulate a workable definition of whether the burdens have been "unfairly" allocated. Obviously, as the debates in the PMA indicate, there was no "perfect" way to apportion the costs. Any analysis of the present problem must leave room for the implementation of some uniform, practical, general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule. The difficulty with the method of assessment adopted by PMA is that it was not uniform and general but made special provision for automobiles. The fact that all automobiles are treated alike should not have prevented the Commission from inquiring whether special treatment for this class of goods was necessary under the circumstances and, if so, whether the special rule adopted was the fairest that could be devised.

The Commission's interpretation of § 17 was also erroneous. The Commission held that since petitioner received substantial benefit from the modernization program it would not make minute inquiry into whether petitioner's benefits precisely corresponded to the costs imposed. The first difficulty is with the conclusion that petitioner received "substantial benefits." Petitioner apparently is not in a position to profit appreciably from maritime modernization. Petitioner will, of course, benefit from any lessening of labor disputes in shipping and related services; but the only disruptions that are avoided by the labor agreement reached here are those that would otherwise have resulted from the efforts of other shippers and of maritime employers to institute the very modernization practices that will not benefit petitioner. It may be that both those who will directly

benefit from modernization and those who will benefit only from increased stability during the course of a modernization program in which they have no interest (and which others have imposed on them) should both pay part of the cost of the Mech fund. However, the existence of such a categorical difference between the benefits received by different groups should at least invite inquiry whether charges are as appropriately proportioned as would be feasible.

In fact, the tax assessed is not "equal" as between Volkswagen and other shippers who will benefit more. The charge to MTC per Volkswagen was figured on a different basis from the assessments for handling other products; the figure reached was a substantially higher percentage of existing costs and charges; and the figure was so high that the additional cost apparently could not be absorbed and debited against future savings from modernization but had to be passed on to the customer. Of course charges need only be "reasonably" related to benefits, and not perfectly or exactly related, *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans*, 6 F. M. B. 415, 418, but in this case inquiry ceased before it had reached even that nearer point.

Finding no disagreement in principle between myself and the Court, I join the Court's opinion upon the premises stated in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1967.

Volkswagenwerk Aktiengesellschaft, Petitioner, *v.* Federal Maritime Commission et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March 6, 1968.]

Mr. Justice Fortas, concurring in the judgment.

I agree with the judgment and with Part I of the opinion herein. I do not understand that the Court's opinion purports to determine the effect of §§ 16 and 17, and I believe that the Court certainly should not do so. I do not join Part II of the opinion dealing with these sections.

SUPREME COURT OF THE UNITED STATES

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[March 6, 1968.]

Mr. Justice Douglas, dissenting in part.

I believe the Court has misconstrued § 15 of the Shipping Act of 1916;[1] and I fear that its erroneous construction will cause serious disruption in the process of

[1] Section 15 provides, in relevant part, that every person subject to the Shipping Act "shall file immediately with the Commission" every agreement with another person subject to the Act:

". . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement." 46 U. S. C. § 814 (§ 15).

The Commission is instructed in § 15 to "disapprove, cancel or modify an agreement" which it finds, after notice and hearing, to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter . . . ."

Any agreement which is not approved, or which is disapproved, by the Commission is declared by § 15 to be "unlawful." And it is also provided that "before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . . ."

working conditions.[6] The situation on the Atlantic Coast was not much better. Although an agreement was reached in late 1934 for Atlantic Coast workers, labor relations remained unstable and work stoppages were rampant. On both coasts, intra-union and inter-union disagreements, coupled with employer-union hostility, made agreement highly difficult. Quickie strikes dotted the ports, and another general strike followed in 1936. On the Pacific Coast, the employers and the ILWU (which had achieved recognition after the 1934 strike) were in constant conflict through 1948, when still another general strike erupted. This period, from 1934 to 1948, has been aptly described as something like "class warfare."[7] As one commentator put it:

> "The ILWU (then a part of the AFL International Longshoremen's Association) gained formal employer recognition as a result of the general strike of 1934, which followed years of exploitation and abuse of longshoremen by their employers. The

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[6] In that strike the International Longshoremen's Association demanded wage increases, a six-hour day, a closed shop, and union control of hiring halls. The employers refused to accede to these demands, and the ensuing strike tied up shipping for almost three months at all Pacific ports. President Roosevelt appointed a National Longshoremen's Board to intervene, after a mediation board had failed to settle the dispute. The union and management agreed to submit to arbitration by the Board, and to end the strike while arbitration was proceeding. Both sides agreed to abide by the Board's decision. The arbitration proceedings took several months, and the award which was eventually rendered represented substantial gains for the union. Hiring halls were to be operated jointly, wage increases were granted, and a six-hour day established. In addition, port labor relations committees were established on which both employers and the union were represented equally; and all issues not decided by those committees were to be submitted to arbitration.

[7] Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Indust. & Labor Relations Rev. 295, 296 (1962).

> bitterness which had characterized the industry carried over into the subsequent employer-union relationships. The employers did their best to break the union, and the union retaliated just as militantly. The years which followed were among the stormiest in U. S. labor history. Between 1934 and 1948, the West Coast had over 20 major port strikes, more than 300 days of coastwide strikes, about 1,300 local 'job action' strikes, and about 250 arbitration awards." [8]

During the stormy 1930's, the Federal Government was greatly expanding its role in labor relations. The NIRA and NLRA greatly revived unionism among both seamen and longshoremen in addition to workers in other industries. Those acts guaranteed the right of collective bargaining and offered a means for recognition of unions; the unions gained members and strength. And with stronger unions, collective bargaining became more widespread. But the explosive situation in the maritime industry was not solved by these general enactments, and Congress passed a series of laws to deal with the labor problems in that industry. First was the Merchant Marine Act of 1936, creating a United States Maritime Commission to investigate conditions of seamen on ship and to determine minimum wage scales and working conditions on vessels that were receiving government subsidies. Despite the 1936 Act, labor relations did not improve significantly; and Congress in 1938 amended the Act, creating a Maritime Labor Board (MLB) with the duty of encouraging collective bargaining and assisting in the peaceful settlement of labor disputes through mediation. A provision of the 1938 amendment required all maritime employers to file with the MLB within 30 days a copy of every contract with any group of its

[8] Kossoris, *supra*, n. 4, at 1.

employees covering wages, hours, rules, and working conditions. Any new contract or change in an existing contract also had to be filed with the Board. The contracts did not require approval by the Board, but were to be used to assist the Board in its mediation activities and in its promotion of peaceful settlement of labor disputes.[9]

The Board was instructed in the 1938 Act to submit to Congress by 1940 its recommendations for establishing a permanent federal maritime labor policy ensuring stable labor relations. The Board in its 1940 report concluded that conditions in the industry were still uneasy, and recommended a permanent federal body with wide jurisdiction over questions of maritime labor—including representation[10] and settlement of disputes. The 1938 Act provided that the Board was to be discontinued in 1941; but in 1940 Congress extended its life until mid-1942 to permit further studies by the Board

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[9] It was noted in a 1941 House Committee Report on a bill providing for a two-year extension of the MLB that the MLB was the "only Government agency with which copies of all labor agreements are required to be filed and these have been studied by the Board with a view to promoting stable labor relations in the maritime industry." House Committee on Merchant Marine and Fisheries, Two-Year Extension of the Maritime Labor Board, H. R. Rep. No. 354, 77th Cong., 1st Sess., 2 (1941).

[10] Under the 1938 Act, questions of representation were reserved to the NLRB. Section 1002 of the Act provided that:

"The provisions of this title shall not in any manner affect or be construed to limit the provisions of the National Labor Relations Act, nor shall any of the unfair labor practices listed therein be considered a dispute for the purposes of this title. Questions concerning the representation of employees of a maritime employer shall be considered and determined by the National Labor Relations Board in accordance with the provisions of the National Labor Relations Act: *Provided, however,* That nothing in this title shall constitute a repeal or otherwise affect the enforcement of any of the navigation laws of the United States or any other laws relating to seamen."

and Congress. Nothing more was done until 1955 when Congress again turned its attention specifically to the problems of maritime labor relations.[11] In the meantime, the MLB had expired. Although several bills were introduced providing for specialized federal control over maritime labor relations, no special machinery was established; and the maritime industry remains subject to the various provisions of federal labor laws.[12]

In 1948 another general maritime strike rocked the Pacific Coast. Following that strike, which lasted about 100 days, there was a "period of relative calm."[13] The 1948 strike had led to a change in employer leadership, a less hostile attitude on the part of the union leadership, and a consequent lessening of tension along the Pacific Coast. Both sides recognized that the reduction of strife was desirable since a substantial amount of traffic had been diverted from the Pacific Coast to other ports or to other means of transportation on account of chronic maritime labor difficulties and work stoppages. But despite the reduction in hostility between labor and

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[11] Hearings on H. R. 5734, before the House Committee on Merchant Marine and Fisheries, 84th Cong., 1st and 2d Sess. (1955–1956).

[12] See, *e. g.*, *Hanna Mining Co.* v. *Marine Engineers*, 382 U. S. 181 (pre-emption of state law by federal labor enactments); *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (jurisdiction of NLRB over employees of foreign-flag ships); *Marine Engineers* v. *Interlake S. S. Co.*, 370 U. S. 173 (pre-emption); *Marine Cooks* v. *Panama S. S. Co.*, 362 U. S. 365 (application of Norris-LaGuardia Act); *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (application of L. M. R. A. to disputes between maritime employees and foreign ships); *Longshoremen* v. *Juneau Spruce Corp.*, 342 U. S. 237 (right of action by employer against union under § 303 (a)(4) of L. M. R. A.); *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 337 U. S. 656 (unfair labor practice); *Southern S. S. Co.* v. *N. L. R. B.*, 316 U. S. 31 (representation; refusal to bargain); *N. L. R. B.* v. *Waterman S. S. Corp.*, 309 U. S. 206 (unfair labor practice).

[13] Kossoris, *supra*, n. 4, at 2.

management, solutions to problems were not readily forthcoming. Business was bad for the shipping companies—foreign competitors had cut heavily into the market, and a decline in business meant less work for both seamen and longshoremen. Modernization was sorely needed, but it was also greatly feared, for mechanization would cut out jobs. But without improved techniques and facilities, the employers could not regain a strong competitive position.[14] In addition to lack of modern,

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[14] As one commentator noted in 1961:

"The longshore industry is technologically among the most backward. An industrial engineer from any one of the mass production industries would be horrified to find sacks of coffee on the San Francisco docks being handled just as they have been handled since sailing ship days. No one of the many separate corporate links in the transportation chain has sufficient interest in greater efficiency to force the changes in coffee handling methods, for example, which, to be effective, must start in Brazil and be carried right through to Hills Brothers or Folgers in San Francisco." Fairley, The ILWU–PMA Mechanization and Modernization Agreement, 12 Lab. L. J. 664, 665 (1961).

The first big change in technology along the docks, notes Mr. Fairley, was the use of lift trucks, propelled by wartime demands for greater efficiency during World War II. Since that time, new methods of bulk handling of cargo have been developed, and unit loads have been increasingly used (such as those made by gluing items together or strapping them together or containerizing them). *Id.*, at 666. One of the most efficient operations of containerization has been used by the Matson Navigation Co. In August 1964 that company cut its rates by nearly 10%, citing cost reductions made possible by a ship improvement and "containerization" plan. The plan relates to container cargo, where the containers are boxes holding up to 40 tons of freight. They are loaded at a factory or distribution point and lifted aboard a ship and unloaded by a single unit. Matson Co. reported that it took about 850 man-hours to load and unload a specially designed container ship carrying 6,500 tons using mechanized equipment. The same cargo carried in conventional loose form would take 11,000 man-hours (about 13 times as much labor) to load and unload. An added attraction of this saving in time is the fact that ships get in and out of port faster,

equipment, employers were further hampered by highly restrictive work rules that had been in effect since the 1930's, such as multiple handling,[15] sling-load weight[16] and gang-sized restrictions.[17]

It is only against this background of chronic strikes and restrictive labor practices that the tremendous im-

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providing additional cost savings. For example, Matson's container ships stay in port less than a day, compared with five days for a conventional ship. Shippers estimate that it cost in 1964 about $3,000 to $5,000 for such things as depreciation, seamen's wages and pier charges for each day a ship stays in port. The Wall Street Journal, Nov. 20, 1964, at 8, col. 2. For a more thorough consideration of the changes in technology that promise great benefits for the shipping industry, see the comprehensive eight-volume study of the United States Department of Labor, Manpower Utilization, Job Security in the Longshore Industry (Wash. 1964). See also Shils, Industrial Unrest in the Nation's Maritime Industry, 15 Lab. L. J. 337, 356–358 (where the author notes improvements in construction of vessels, the use of highly mechanized cargo ships, changes in engine room operation, in the Deck Department and in the Steward Department; and a new line of semi-automated vessels); Hagel and Goldblatt, Men and Machines, Joint Publication of the I. L. W. U. and P. M. A. (San Francisco 1963).

[15] Multiple handling refers to the labor practice requiring the cargo to touch the "skin of the dock" after being unloaded before someone other than a longshoreman can handle it. For loading of cargo, only the longshoreman can place it on the ship after a teamster has unloaded it from his truck onto the dock. Kossoris, *supra*, n. 4, at 2.

[16] Sling-load weight is the weight limit for a load of cargo. In 1961 the maximum weight was usually about 2,100 pounds per pallet (although much heavier loads apparently could have been carried safely). Larger pallets were "skimmed down" to 2,100 pounds by longshoremen. *Ibid.*

[17] Each major port would have its own rules stipulating the number of men needed on gangs. Frequently, the number was more than was needed for the job. For example, the "four-on four-off" gang required eight men in the hold of a ship, although only four actually worked while the other four rested. *Id.*, at 3. See generally Killingsworth, *supra*, n. 7; Hartman, Union Work Rules: A Brief Theoretical Analysis and Some Empirical Results, U. of Ill. Bull., Institute of Labor & Industrial Relations (1967).

pact of the M & M fund can be appreciated. That was the heart of the 1960–1961 settlement. As noted by one commentator intimately acquainted with the negotiations of the parties, "[t]his agreement did not spring full-blown from the brow of Zeus, or from the brain of Bridges." [18] Rather, "The agreement, which was hammered out in 5 months of negotiations ending in October 1960, culminated 4 years of discussion between the PMA and the ILWU." [19]

Earnest bargaining began in 1957. PMA wanted to obtain a guarantee from the ILWU that strikes and work stoppages would not result from the introduction and use of mechanization and other labor-saving devices. In return, the union wanted its workers to share in the costs savings resulting from modernization, and desired assurances that changes in work methods would neither create unsafe working conditions nor accelerate the productivity required of individual workers. After two years of preliminary negotiations, an agreement was made in August 1959 which provided for a further study of the problems of mechanization and for the establishment by PMA of a fund of $1,500,000 for the benefit of union workers.[20]

Negotiations beginning in May 1960 led to a "Memorandum of Agreement on Mechanization and Modernization," concluded in October 1960, and providing for a $29,000,000 trust fund to be financed by PMA. The fund was to consist of the $1,500,000 due under the 1959 agreement plus another $27,500,000 to be accumulated over a five and one-half-year period at the rate of $5,000,000 per year. The fund was to be used to protect

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[18] Fairley, *supra*, n. 14, at 666.

[19] Kossoris, *supra*, n. 4, at 1.

[20] Although the method of raising this amount of money was not specified in the agreement, PMA accumulated the fund by assessing its members under a man-hour formula.

longshoremen and marine clerks from the consequences of reduced employment caused by mechanization. The agreement was to enter into force upon approval by the members of PMA and the ILWU, and was to expire on July 1, 1966.[21] The agreement also provided management with the relatively free rein it had sought to eliminate restrictive work practices. The former practice of multiple handling was eliminated, and the minimum size of a gang for loading and unloading operations was specified. The sling-load limit for loads was to remain unchanged if the manner of operation was the same as when the limit was first negotiated; otherwise, the employer could set the weight, provided that he acted "within safe and practical limits and without speed up of the individual."

Thus, the agreement satisfied the desire of employers to modernize and eliminate outmoded and restrictive work rules, and at the same time provided a measure of security for the workers whose jobs would be affected

[21] In August 1966 a new agreement was signed which continued the M & M fund until 1971; but this time the employers agreed to pay even more into the fund each year—$6,900,000. Both the union and the employers were highly satisfied with the way the plan had worked. For a general description of the 1966 contract, see Business Week, July 23, 1966, at 108; Kossoris, 1966 West Coast Longshore Negotiations, 89 Monthly Labor Rev. 1067. Kossoris points out the great effect which abolition of restrictive work and increased use of modern technology had had for the employers: "Tonnage increased by about 32%; but man-hours remained about the same. Despite an increase over the period of 56 cents in the basic wage and liberalization of fringe benefits, including the $5 million the employers paid into the fund, the cost per ton dropped from $6.26 to $6.16. . . . Making allowance for all important factors involved, the gain to employers from the M&M agreement may be placed conservatively as well in excess of §150 million. Subtracting from this the $27.5 million paid into the M&M fund over the 5½ year period of the last contract makes the employer estimate of $120 million net gain appear realistic." *Id.*, at 1068–1069.

by the use of the new devices. The agreement, however, left open the question of how the employers' contributions of $5,000,000 a year would be raised. The question of a proper method of assessment had been discussed by the union and management during the preceding negotiations; several suggestions were offered by the parties. But in return for a commitment from the PMA members obligating themselves individually and collectively to the payment of the fund, the ILWU agreed to permit PMA to establish the method of payment.

PMA then set up a Work Improvement Fund Committee to determine the best method of raising the money. That Committee considered various bases for assessing contributions—man-hours of each employer, cargo tonnage, a combination of the two, cargo tonnage moving in containers, measurement of improvements in longshore productivity. The Committee majority recommended a cargo tonnage basis; its reasons for doing so were summarized by the court below as follows:

> "The Committee recommended a formula based on cargo tonnage as a 'rough-and-ready' way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It considered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.
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> "The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to pre-

vent the continuation of any hardship or inequity that might develop." [22]

In recommending the tonnage formula, the Committee noted that the same system was used for assessing a part of PMA dues. It had also been the practice of PMA to use a tonnage formula for assessments allocating other types of labor costs, such as joint maintenance of dispatch halls and the payment of arbitrators' salaries.[23] In fact, it appears that the ILWU had itself proposed a tonnage formula during the negotiations and asked that it be incorporated into the collective bargaining agreement; but PMA resisted this approach, apparently wishing to keep its options open and fearing that incorporation in the agreement might tend to commit the PMA to a fixed formula that would also be included in a future agreement. The tonnage formula recommended by the Committee was subsequently adopted by the PMA membership.

It was specifically provided in the agreement that each employer would abide by the formula adopted by the Association; and this promise to comply was the *quid pro quo* for the union's agreement not to write any particular formula into the contract or take part in the determina-

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[22] 371 F. 2d 747, 758 (C. A. D. C. Cir. 1967).

[23] We are told that this is not the first time that PMA members have entered into agreements among themselves to form and finance their collective bargaining agreements. They have agreed to the presentation of uniform bargaining terms, and have provided, through agreements among themselves, for the administration and implementation of their union contracts. All of these would affect transportation rates. In essence, such agreements, no less than the funding method employed by PMA, have established uniform costs for all employers of maritime labor—indeed the primary object of industry-wide bargaining has been to establish uniform wages, fringe benefits, and working conditions.

tion of the method of assessment.[24] Thus the PMA decision on the method of assessment was part and parcel of the collective bargaining agreement. Indeed, the

[24] Mr. Paul St. Sure, President of PMA, testified:

"It [the method of payment of the fund] was a definite part of the negotiations in that the union took a position with regard to the method of collection. PMA took a position with regard to the method of collection. There were discussions with the union during negotiation as to the problems that had been presented by the method of collection used with relation to the million dollars and a half.

"We discussed with the union the differences of opinion among our own members as to the equitable method of providing for the collection of this money.

"We ended up with an agreement by the union that, inasmuch as the employer members of the bargaining unit had committed themselves specifically to the payment of the sum, that whereas they were interested in the assurance that the sum would be collected, they would allow us to work out among ourselves the method of actual collection within the membership of PMA."

Such action, however, did not make the union a disinterested party; rather, the union certainly had a continuing interest in the method of financing the fund. Mr. Paul St. Sure, of the PMA, an official deeply involved since 1948 in negotiations with the ILWU, testified:

"There was a continuing interest and a continuing concern as to whether or not the collections under the fund were being met. Obviously they have, by joint trusteeship, joint custody of the fund, and I can assure you that they were alert as to whether or not the method of the custody, was working, because they believed this and, in fact, knew it was their money to spend in accordance with the agreement.

"After all, this was a continuing relationship that we have, by the collective bargaining agreement, and my experience would suggest to me that we couldn't have adopted the method which would defeat the very purpose for which we had reached a bargain without having further negotiations."

The Hearing Examiner stated in his opinion that "Mr. St. Sure testified that the ILWU's interest in the method to be adopted, ceased after it was agreed that the method of collection was to be

modernization plan was the heart of that agreement, and the subsequent assessment plan merely implemented the employers' duty under the collective bargaining agreement to establish a fund specifically marked to protect maritime workers against the far-reaching effects of modernization.

PMA treated the financing of the fund as an integral part of the collective bargaining process. The Committee established by PMA to recommend a funding formula was appointed by the negotiating committee which worked on the collective bargaining agreement; [25] and the PMA membership ratified both the collective bargaining agreement and the funding formula at the same time.

It is not, I submit, possible, as a practical matter, to separate the M & M fund provision in the collective bargaining agreement from the subsequent decision of

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reserved to PMA." In the printed record before the Court, however, I find no reference in Mr. St. Sure's testimony to a lack of interest on the part of the union concerning the method of collection of the fund. The Hearing Examiner does not indicate the testimony on which his interpretation of Mr. St. Sure's presentation is based; and, at the least, that part of his testimony quoted would appear to raise a strong doubt whether it could be said that the interest of the union ceased. In any event, it is clear from Mr. St. Sure's testimony that the method of collection was a prime topic of negotiations between the parties, and that the employers' decision on the matter was intimately tied with the collective bargaining agreement.

[25] Mr. St. Sure testified:

"Well, this was still part of the bargaining process. We were still actually trying to conclude the bargain which we had developed and had signed a memorandum to cover. We still had the responsibility as a negotiating committee of reporting back to the board of directors, and then to the membership, and this was simply a convenient means of calling in some men that we felt were more expert in this field than the negotiators were who were operating people to make a recommendation as to a method of payment."

the PMA membership concerning how the fund was to be raised. A collective bargaining agreement is the product of negotiations. How can negotiators sitting at a table arrive at an agreement if they know that a major part of it depends on the approval of the Federal Maritime Commission? How many months—or years—will it take to get approval? What will happen meanwhile? Will not the imposition of that kind of administrative supervision bring an end to, or at least partially paralyze, collective bargaining?

The M & M fund is a labor expense. Increased labor costs normally are passed on at least in part by increased prices. When the Auto Workers were recently negotiating with General Motors for a guaranteed annual wage, what would have been the consequence if nothing could have been decided until a federal agency had determined whether the impact on prices or on the economy was proper? I can imagine a regime of total controls where such prior approval would be required. But we have no such regime at present; and I can see no possible justification for a judicially created one in the explosive maritime field. To meet the costs increased by any collective bargaining agreement, a company might have to raise its prices and pass at least part of the added cost on to the consumer. But this happens all the time in the maritime industry, as well as in other industries, and does not constitute rate fixing of the type at which the Shipping Act is aimed. There is nothing in the legislative history of the Shipping Act which suggests that § 15 gives the FMC the power or license to oversee labor negotiations. But that is the effect of what the Court does today when it decides that the employers' agreement here must be submitted to that body for approval.

My Brother HARLAN suggests that the assessment agreement can be distinguished from the collective bargaining agreement because "the union was concerned

that the question [of how the cost burden of the fund was to be allocated] receive *some* answer, but had no proper interest in *which* of the possible cost allocation plans was adopted, . . ." (*Ante*, p. 8.) But to argue that the union does not care from what source the PMA gets the money for the fund is both questionable [26] and irrelevant, for such an approach ignores the fact that there are two parties to a collective bargaining agreement. The PMA members do care how they will be assessed $27,500,000 for a fund dedicated to the benefit of their employees. The M & M fund was the key provision in the agreement, and without it there may well have been no agreement at all. The parties should not be expected to wait to settle their differences while the FMC decides under § 15 whether the employers' funding plan is in the public interest. Speedy resolution of labor disputes by collective bargaining has been the consistent federal policy.

The Solicitor General would have us atomize the collective bargaining agreement and treat the schedule of charges that create the fund as a mere "side agreement." But without the so-called "side agreement" there would have been no collective bargaining agreement. And it must be remembered that § 15, if applicable, requires that an agreement be filed "immediately with the Commission." What would have to be filed is the entire agreement, not merely the proviso to which petitioner now objects. The Commission then must give notice and a hearing and "disapprove, cancel or modify" the agreement. Which persons would be entitled to participate in the hearing presents an initial problem.[27] Thereafter, what provisions would become the target in the hearing

[26] See n. 24, *supra*.

[27] See FMC Rule 9 (b), 46 CFR § 502.72 (petitions for intervention in FMC proceedings). See also FMC Rule 10 (c), 46 CFR § 502.143 (notice of hearings).

is conjectural. The target might be small or large. But certainly no collective bargaining agreement could become operative until its underpinning—the fund—was thoroughly litigated. Meanwhile years might pass as the contest wound its way slowly through various tribunals and the labor problems continued to fester.

This is what my Brother HARLAN overlooks when he suggests that advance approval of "labor-related agreements" might be more desirable from the standpoint of facilitating collective bargaining than leaving open the question whether the agreement, or parts of it, would be subject to the antitrust laws. Presumably, he means that legal uncertainty concerning the possible vulnerability of certain provisions of an agreement to attack under the antitrust laws might stall negotiations or lead some association members to decline to cooperate in carrying out the agreement, fearing a treble-damage action. To be sure, the parties to a collective bargaining pact must frame their agreement to fit within the standards of the antitrust laws or any other governing statutes. But without a requirement of advance approval of the terms of the agreement, they remain free to bargain speedily. Frustration of the collective bargaining process comes not so much from the possibility that one or more provisions in a collective bargaining pact might be found illegal at some future date under the antitrust laws, or other statutes such as §§ 16 and 17 of the Shipping Act, but rather from the undue and possibly lengthy freezing or stultification of solutions to troublesome labor problems while an intimate part of the proposed agreement is sent to the FMC for approval.

With all respect, the Court's approach in requiring the funding plan to be submitted to the FMC for approval under § 15 of the Shipping Act will frustrate legitimate and speedy collective bargaining in the maritime indus-

try. Neither the Court nor my Brother HARLAN is able to refer to any legislative history which indicates that Congress considered the Shipping Act to require the filing of labor agreements or provisions of those agreements under § 15.[28] The Court instead takes the approach that the Shipping Act provisions were purposely drawn broad enough to encompass association agreements which have more than a *de minimis* effect on commerce. This rationale would require the filing of any collective bargaining provision agreed to by PMA members that raised labor costs beyond the point at which PMA members could be expected to absorb those costs without raising prices or charges.

The Court may well mean, as my Brother HARLAN suggests, that the "obligation to collect the Mech fund," contained in the collective bargaining agreement, is not to be examined by the Commission on remand, but rather the question is to be limited to the "propriety of the choice of the route to that objective." But that misses the mark. My point is that the latter question is as much a part of the bargaining process as the former. Commission control over either question runs substantial risk of frustrating agreement by the parties on both issues, not to mention other matters in the collective bargaining pact. For example, if an allocation formula satisfactory to PMA members and to the Commission could not be devised, the fund might never be established, requiring perhaps other changes in the agreement, such as higher wages or continuance of some or all of the restrictive work rules.

If the present practice is an abuse, there is an existing remedy. This agreement between employers could of

[28] Indeed, the legislative history would appear to be to the contrary. See n. 9, *supra*.

course be challenged in the courts as violative of the antitrust laws.[29] Moreover, §§ 16 and 17 of the Shipping Act afford protection to foreign commerce in cases of undue discrimination or unreasonable practices affecting that commerce. While I cannot say that the Commission erred in finding no violation of § 16, I concur in a remand to the Commission for further findings under § 17.[30]

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[29] The circumstance that the funding plan originated in collective bargaining and was a part of a collective bargaining agreement would not automatically create an exemption from the antitrust laws. See *United Mine Workers* v. *Pennington*, 381 U. S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U. S. 676; *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797.

[30] The Commission held under § 16 that that section is violated only if there is discrimination between competitors, which was not the situation here because the marine terminal companies have imposed no higher charges on Volkswagens than on other automobiles. Although such an interpretation is supported by the construction placed on § 3 (1) of the Interstate Commerce Act, 49 U. S. C. § 3 (1), *United States* v. *Great Northern R. Co.*, 301 I. C. C. 21, 26–27, on which § 16 of the Shipping Act is modeled, *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480–481, it has been suggested that the Commission has undermined its own rule by not requiring a competitive relationship in cases not involving freight rates: *Investigation of Free Time Practices—Port of San Diego*, 9 F. M. C. 525 (1966) (port free time); *New York Foreign Freight Forwarders and Brokers Assn.* v. *FMC*, 337 F. 2d 289 (C. A. 2d Cir. 1964), cert. denied, 380 U. S. 910 (billing methods of freight forwarders); *Swift & Co.* v. *Gulf & South Atlantic Havana Conference*, 6 F. M. B. 215 (1961) (route restrictions); *Storage Practices at Longview, Washington*, 6 F. M. B. 178 (1960) (storage charges). Moreover, it is argued that the competitive relationship test employed by the ICC under § 3 (1) of the Interstate Commerce Act is not "an indispensable element in a situation of undue prejudice and preference, . . ." *Joseph Goddard Realty* v. *New York, Chicago & St. Louis R. Co.*, 229 I. C. C. 497, 501. The Maritime Commission's refusal to require a competitive relationship in certain cases, however, has diluted that principle only in those situations in which there are services that are not dependant upon the nature of the cargo and the various charges therefor. In the instant case, how-

If the finding is for petitioner, there may be an incidental and after-the-fact effect on the provisions of the collective bargaining agreement. But it will not produce

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ever, there are different charges levied depending upon the nature of the cargo involved. Petitioner conceded before the Hearing Examiner that "[w]e do not claim that the measurement formula 'regardless of how manifested' subjects Volkswagen automobiles to 'prejudice or disadvantage' as compared to other automobiles, and we submit that there is no other cargo classification in competition with automobiles." The competitive relationship rule has been applied consistently by the Commission in appropriate circumstances. The same rule has also been used by the ICC. Since I cannot say in the circumstances of this case that the requirement of a competitive relationship is unreasonable or inconsistent with the provisions of the Shipping Act, I would defer to the Commission's expertise. *Consolo* v. *FMC*, 383 U. S. 607.

With respect to § 17, the Commission expressly noted that (1) the measurement basis for assessing automobiles resulted in an assessment almost 10 times greater than a weight basis ($2.35 per vehicle as against approximately $0.25); (2) that although other cargo was assessed as manifested, vehicles were always assessed on a measurement basis; and (3) while automobile cargo would probably receive only general benefits from the mechanization plan (such as freedom from strikes and slowdowns), such cargo, unlike some other cargo, was unlikely to benefit from technological improvements in loading and unloading. Yet, the Commission held that the difference in treatment was not unreasonable because although automobile cargo may not have benefited as much as other cargo, it did receive "substantial benefits" from the mechanization agreement. As the Court holds, however, such a standard, which focuses on only the benefits received, represents too narrow a view of § 17. What petitioner is contesting essentially is PMA's decision to adopt as the revenue ton for automobiles not a weight ton (2,000 pounds) but a measurement ton expressed in volumetric terms (40 cubic feet/ton). Since the average Volkswagen weighs only 1,800 pounds, but measures about 8.7 tons on a volume basis, it is being assessed $2.35 compared with the $0.25 it would otherwise have to pay on the basis of a weight-ton measurement. It is argued that this exaction is grossly disproportionate in light of the limited benefits which petitioner could expect to receive from the mechanization agreement as compared with those which other shippers could antici-

the paralyzing effect which will follow when prior approval is required. The application of §§ 16 and 17 in particular instances can indeed realistically be compared with enforcement of federal antitrust laws directed against specific practices.

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pate. To focus an inquiry solely on the benefits received may obscure the disparity between the charges ultimately falling upon petitioner and those exacted from other shippers. The Commission should compare the benefits received with the charges imposed on petitioner's cargo and with those levied upon other cargo, which receives substantially similar benefits, before the question of reasonableness can be resolved. This determination is for the Commission to make in the first instance.